No. 472

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Supreme Court of the United States

OCTOBER TERM, 1962

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO. INC.,

Plaintiff-Respondent,

against

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Defendant-Respondent,

and

OVE GUSTAVSSON CONTRACTING CO. INC.,

Petitioner and Intervenor-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE UNITED STATES OF AMERICA for the use and benefit of

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MASSACHUSETTS BONDING & INSURANCE COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: THE HONORABLE THE CHIEF-JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, above-named, prays this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the latter's affirmance of the judgment entered in the United States District Court for the Eastern District of New York in favor of the use-plaintiff in the sum of $19,459.75 and costs.

a. Opinions Below

The opinion of the Court of Appeals is reported at 303 F. (2) 823, and that of the District Court at 195 F. Supp. 26. Both opinions are appended herewith. Also there is

appended the opinion of Mishler, J., sitting at Motion Term dated January 5, 1960 granting appellant's motion to intervene on condition that it waive its right to trial by jury (88).*

b. Jurisdiction

i. The judgment of affirmance was entered in the office of the Clerk of the District Court for the Eastern District of New York on the 6th day of July, 1962.

ii. The order of the Court of Appeals denying a rehearing was made on the 3rd day of July, 1962. No extension of time to file this petition was sought.

iii. It is believed that the provisions of Title 28 U.S.C.A., Section 1254, subdivision 1 confers upon this Honorable Court, jurisdiction to review the judgment in question by a grant of this petition for a writ of certiorari to the Court of Appeals, Second Circuit.

c. The Questions Involved

1. May a trial by jury be taken from appellant by judicial direction, where the demand for a jury trial is in an action at common law where the value in controversy exceeds twenty dollars, in clear violation of the right guaranteed to a party by Amendment 7 of the United States Constitution, just because appellant entered this case by way of the intervening statute, Rule 24 of the Rules of Federal Civil Procedure.

2. If it be held that the action of the Courts below in requiring appellant's waiver of a jury trial as a condition to its intervening was lawful, then, the second question is: Was the "clearly erroneous" rule properly applied in an action under the Miller Act by a materialman for the

* References are to appendix to this petition unless otherwise specified.

contract price of lumber sold to the general contractor where the courts below disregarded the evidence of both sides as to the intent of their contract and found instead another contract, where the courts below misapplied the law in holding that plaintiff had "substantially performed" and thus the burden of proving non-performance of the sales contract was shifted to the defending party, and where there were no subsidiary facts in the evidence to support the finding of "substantial" performance on the part of the use-plaintiff and finally, where there was a disregard of uncontradicted evidence proving use-plaintiff's failure to perform according to the contract of the parties.

d. Constitutional Provisions, Treaties, Statutes, Ordinances or Regulations Involved

Article 6, Clauses 2 and 3 of the United States Constitution (44s);

Amendment No. 7 of the United States Constitution (44s);

Rule 24(a) of the Rules of Federal Civil Procedure (46s);

Rule 38(a) and (b) of the Rules of Federal Civil Procedure (45s);

Rule 39(a) of the Rules of Federal Civil Procedure (45s);

The Miller Act, 40 U.S.C.A. Sections 270a and 270b (46s-48s).

e. Statement of the Case

This action was commenced by use-plaintiff, a lumber dealer, in the United States District Court for the Eastern District of New York, under the Miller Act, Sections 270 (a) and (b) of Title 40 U.S.C.A., to recover, as a material

man, for lumber sold and furnished appellant, a general contractor with the United States Navy under a contract performed at the Brooklyn Navy Yard within the Eastern District of New York. The action was commenced against the surety alone. After the surety filed its answer, the general contractor, appellant, sought to intervene.

The contract of appellant with the government was dated December 13, 1958. It was for the sum of $158,768. Actually appellant was required to remove the old fender on the side of the pier and replace it with a new one. The new fender had to be fabricated before it could be hung in place. The new fender was a series of timbers, railroad-tie size, actually 12 x 12, formed into squares and quadrangles called bays, 8 feet wide, joined together, and hung the length of the pier a distance of some 1,400 feet. The fender was hung on steel brackets affixed into the pier itself in such a manner that it would ride up and down in the brackets. The greater the pressure against the fender, the higher up on the brackets the bays would rise. The ship would lay against the side of the bays, without damage to its skin or to the side of the pier, the bays providing a cushion for the ship. The timbers of the bays had to be cut to size, squared, bevelled, notched at the places where the cross-pieces would be joined to the upright pieces, which notching had to be deep enough and wide enough to allow for the pieces to be joined together with their surfaces flush. This notching was called "dadoes" under the contract and is referred to in that manner by the parties. The word chamfering is also used by the parties. This means the same as bevelling, only it is applied to a timber whose lengthwise edge has been cut. Also, because the timbers were to be bolted together, holes had to be drilled at the specified places and aligned to receive the bolts, and, the bolt heads had to be countersunk to below the surface of the fender's surface.

The use-plaintiff agreed to furnish and fabricate the necessary timbers for the fender. It agreed to deliver

them to the job site within a time specified in the contract as commencing 5 to 6 weeks and completely delivered within 90 days. Both use-plaintiff and the contractor testified that it was the intention of the parties that the use-plaintiff was to furnish the timber so fabricated as to enable the contractor to bolt the timbers together which would make them ready for hanging over the side. Thus, both sides said, there would be but a single assembly operation of the timbers, by the purchaser, the general contractor,. The testimony of this intention of the parties as given by the plaintiff appears at pages 14-18 of the Intervenor Appellant's Reply.

In addition to this testimony of the terms of the contract of sale, there were the following writings said to evidence the agreement of the parties.

(a) Plaintiff's Exhibit 1: Appellant's contract with the Navy dated December 13, 1958.

(b) Defendant's Exhibit M: Government specifications for lumber to be supplied for fender system.

(c) Defendant's Exhibit N: Government drawings of Specifications for lumber to be used in fender system.

(d) Plaintiff's Exhibit 2: Plaintiff's offer dated December 15, 1958, to supply the timber for said contract, together with appellant's acceptance, written thereon.

(e) Plaintiff's Exhibit 3: Plaintiff's letter to appellant dated January 16, 1959, being the first confirmation of intervenor's order.

(f) Plaintiff's Exhibit 4: Shop drawings.

(g) Defendant's Exhibit A: Defendant's letter to plaintiff, confirming order for timbers, to meet Navy specifications.

(h) Defendant's Exhibit J: Plaintiff's letter of January 27, 1959 to the U. S. Navy confirming the sale of

lumber to appellant and requesting inspection by Navy personnel.

(i) Defendant's Exhibit E: Copy of U. S. Navy letter of January 29, 1959 to the Navy's Pennsylvania office requesting them to inspect lumber, which copy was sent to plaintiff.

(j) Plaintiff's Exhibit 5: Plaintiff's second confirmation of previous order, signed by appellant.

Note that each of the foregoing exhibits are dependent upon each other to express the contract of the parties and not one of them can be said to contain the whole contract and in neither event is the intention of the parties aforementioned stated in any of the writings. Yet, that intention was expressly testified to by the parties as being the bargain which had been agreed upon by them. The total price for these timbers was $25,049.59.

Later, on three separate occasions, three additional orders for additional lumber were given for a total of approximately $2,000, but the contractor raised no objection to the use-plaintiff's fullfilment of these contracts and they are not in the picture, except in a very indirect way. This dispute centers around the first contract or order for timbers, the one for $25,049.59 because they were not fabricated as required by the contract of the parties. As between the parties, the only dispute, before this suit was commenced and on the trial, was how much was to be paid appellant for doing the corrective fabrication. No dispute existed between them as to the terms of the contract. Yet, the court found that the only terms were those stated in the use-plaintiff's letter of January 29, 1959, which is marked Plaintiff's Exhibit 5, which says nothing about the fact that the fabrication of the timber was to be done so as to enable the petitioner to assemble them into bays of the fender system. Both courts found that said Exhibit 5 was the contract of the parties in disregard of the undisputed and conceded evidence above-

mentioned. Nor was there a dispute between the parties that the timbers when delivered required holes and certain corrective fabrication to make them suitable to be joined together into bays and that this additional work necessitated a prior temporary assembly of the timbers. So that, instead of one assembly, two assemblies took place before the bays could be formed and joined for hanging overside. After disregarding the uncontradicted proof on this kind of seller's performance of the contract, both courts by asserting that a seller need show only "substantial" performance, improperly shifted the burden of proving the seller's failure to perform according to the contract upon petitioner, the buyer. Even here, both courts concluded as they did without support in the subsidiary facts, in fact, in contradication to the only evidence of the condition of the timbers upon delivery which was that upon delivery, the timbers were not suitable for the last assembly operation. In other words on the question of the nature of the seller's performance, the courts below not only applied an erroneous rule of law, but they did so without any support in the evidence for that erroneous rule of law.

The chronology of the events leading to the performance of the first order for timbers was as follows:

The first delivery was April 28, 1959. This was of horizontal pieces only, forty in all. Without the vertical pieces no work could be done on the timbers. Hence they were a useless delivery. This delivery was about ninety days from the date of the last writing of the parties. Even that writing required the first third of the total order to be delivered in five or six weeks, or by March 15, 1959. The second delivery was also of horizontal pieces only and that of 60 pieces and was made on May 4, 1959. This delivery too, was useless as no work could be done with these until the vertical pieces were also delivered. The first delivery of vertical pieces was made on May 22, 1959. The rest of the deliveries came in after May 22, 1959, the last one

on August 10, 1959. The delay in the commencement of deliveries was attributed to the failure of the use-plaintiff's fabricator to drill the holes in the timbers.

While waiting for the timbers, the Navy ordered petitioner to visit the plant of the fabricator, the National Wood Preserving Company of Haverford, Pennsylvania, which had been employed by the seller for that purpose. The petitioner visited the plant at Haverford in the company of Anderson plaintiff's representative, on May 15, 1959. While there the parties agreed that the drilling would be done by petitioner at a cost to be determined later. The bevelling, cutting to size, the squaring and dadoing was to be continued by use-plaintiff. The testimony as to the terms of this new arrangement was in dispute in one respect only, i.e. the price. The use-plaintiff claimed on the trial that the price was to be the same as its own charge of 20 cents per hole made to petitioner under its letter of January 29, 1959, Plaintiff's Exhibit 5. The petitioner stated that the price could not be agreed upon as the cost of the drilling was an unknown factor. There was a witness to the conversation, a Mr. Jacoby, president of National Wood Preserving Company, and he said that he did not hear any discussion about the twenty cents but only that the drilling would thenceforth be done by petitioner. The trial court found that there was no agreement made about the price for the drilling to be done by petitioner. Therefore it said, and the Court of Appeals agreed with it, that as there was no proof of an agreement on price, it would allow the 20 cents claimed by use-plaintiff. The courts below said not a word about a fair and reasonable price to be paid to petitioner. Petitioner sought to recover its proven cost of the drilling. This was not allowed. Yet, use-plaintiff had pleaded a cause of action for the contract price of an executed contract of sale as modified in the respect that delivery was to be without holes as previously agreed at a credit to the purchaser of twenty cents per hole. Proof of the contract and of its

modification normally would have to be made by the use-plaintiff for that was its pleading, but the courts placed the burden of proving the agreement of a specific price change upon petitioner, instead who had only pleaded and sought recovery on a *quantuum meruit* basis.

There was no attempt by use-plaintiff to prove that at the job site the timbers it delivered were as specified and as required by the contract and according to the aforesaid intention of the parties. The only proof on the condition of the timbers at delivery came from the evidence of the general contractor, its engineer and the government inspector whose duty was to check the job for the government. These people not only saw the timbers but the president and the engineer actually engaged in the work to make the timbers fit for the purposes intended. The timbers according to these witnesses and their daily records were so improperly fabricated or were so damaged in transit, that the general contractor was obliged to dadoe, bevel, chamfer, cut to size and square them. In some cases, the timbers were too short, petitioner applied for and received the government's permission to make the bays 7 or 7½ feet wide to accommodate the short sizes. This necessitated cutting to even lengths, bevelling and dadoing anew. Some of the timbers were received at the job site damaged in transit and some of these were salvaged by cutting them down to horizontal piece size to replace damaged horizontal pieces or they were replaced altogether by the general contractor out of his own stock, or from another dealer. This work of drilling and corrective fabrication was commenced on May 22, 1959 and went on through to December 1, 1959. It was recommenced in April, 1960 and was continued to the middle of May, 1960. This last period was after this suit was started. This latter work was the work done to make the "new" timbers ready. They had to be fabricated from the rough state.

As the suit was started against the surety alone, the general contractor wanted to intervene to press its counter-

claim. In moving to intervene, it attached its proposed pleading and across the face of the proposed pleading, there was written "Trial by Jury Demanded". The motion was heard by District Judge Mishler who by decision dated January 5, 1961, stated

> "Motion to intervene pursuant to Rule 24 is granted upon condition that intervenor waive right to trial by jury * * *."

An order was entered upon said decision and pursuant thereto appellant filed its plea of intervention and the waiver required by the court. The waiver specifically recited that it was made only in compliance with the order of the court (10s).

The case thereafter went to trial before District Judge Byers who dismissed the counterclaims of the appellant except for $381 and allowed the materialman to recover the price, erroneously, as mentioned above.

ARGUMENT

I. The decision of the Court of Appeals in upholding Judge Mishler's order requiring appellant to waive its right to a trial by jury as a condition to intervening in this action, decides an important Federal law in a way in conflict with the applicable decisions of this court, or which perhaps, has not been precisely before this court and should be settled by this court, and in any event, said decision has so far sanctioned a departure by the lower court from the usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

The Court of Appeals in upholding the District Court's decision in requiring that the jury be waived by petitioner as a condition to its intervening in this case stated as follows:

> "It is important that this fundamental right be preserved intact and not eroded by unsympathetic interpretation or the imposition of conditions designed to clear up the calendars of the courts. We sustain the action of Judge Mishler in granting the motion to intervene on condition that there be filed a waiver of jury trial, and we do so only because of the peculiar circumstances of this particular case and because we believe the dilatory tactics here practiced and other maneuvers that we find it not necessary to describe in detail are not to be condoned."

The Court of Appeals' shedding a crocodile tear for a constitutional guarantee, obviously is not the way for the court to satisfy its duty to uphold a constitutional guarantee. It must enforce the right no matter how obvious the duty. It is apparent that the court wanted to punish the petitioner, but it cannot do so at the expense of the violation of a constitutional right. If it does so, then you will have government by men and not by law. This is repugnant to everything this court has stood for since its beginning.

In the first place the constitution is the supreme law of the land. It is binding upon the courts, as well as the other branches of the government. *Marbury v. Madison*, 5 U. S. 137, 1 Cranch 137, 180.

In the second place there is no evidence to support the conclusion of the court that there were any dilatory tactics practiced here or that there is any necessity for punishing the petitioner.

The Seventh Amendment of the United States Constitution reads:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The constitution not only declares that the right of trial by jury is one of the rights guaranteed to the people, but it imposes upon those responsible for the operation of the government under it and specially upon the judiciary, the obligation to enforce it. Article 6, subdivision 2 of the constitution declares that the constitution is the supreme law of the land automatically making it binding upon the courts. That would also make it self-executing and no rule, statute or regulation is needed to implement it. Even this court is subject to the constitution, as it is a constitutional court, and the question was so decided heretofor. As a legislative Court, the Court of Appeals may aid in the interpretation of the constitution, subject to the supervision of this court, but it cannot refuse to be governed by the constitution. The oath of office of each judge binds him to uphold the constitution.

Where a court in this land has deprived a party of his constitutional guarantee, it would no longer have jurisdiction to proceed. The constitutional mandate is an essential prerequisite to a Federal Court's jurisdiction.

Johnson v. *Zerbst*, 304 U. S. 458, 467, 468.

The court's obligation is to guard and enforce every right secured by the constitution.

Mooney v. *Holohan*, 294 U. S. 103, 113;
Robb v. *Connolly*, 111 U. S. 624, 637;
Marbury v. *Madison*, *supra*;
Reid v. *Covert*, 354 U. S. 1, 10.

Obviously, if it does not, it sets itself up above the constitution. Every decision finding an exception to the constitutionally guaranteed rights, when there is none, destroys and lessens the influence of the constitution, and corollarially, the judiciary imports into the judicial system more power than is rightfully entrusted to it under the constitution.

The Court of Appeals in this case said that appellant was not entitled to a jury trial. Yet, this action is an ordinary common law suit on a contract to recover a money judgment. The sum exceeds twenty dollars. Both the use-plaintiff and the petitioner demanded money judgments, the use-plaintiff in its complaint, the petitioner in its counterclaim. Petitioner, therefore, had the right to defend this action before a jury and also to press its counterclaims before a jury. This court has already stated with respect to a sub-contractor's suit, in a predecessor statute, to the Miller Act, that the nature of the cause of action is not changed from its original form of a common law action for breach of contract.

Illinois Surety Co. v. *Peeler*, 204 U. S. 214, 223-225.

The lower courts have recognized the right to a jury trial in a *Miller Act* case.

R. P. Farnsworth & Co. v. *Electrical Supply Co.*, 112 F. (2) 150, cert. den. 311 U. S. 700;
U. S. for Use of Mutual Metal Mfg. Co. v. *Biggs, et al.*, 46 F. Supp. 8, 11;
U. S. For Use of Reichenbach v. *Montgomery*, 155 F. Supp. 384;
Nolan Bros. Inc. v. *U. S. for Use of Fox Bros. Const. Co.*, 266 F. (2) 143.

The Rules of Federal Civil Procedure implement this constitutional right of trial by jury in a civil case by requiring how, procedurely, it shall be preserved. Rules 38 and 39a of the Rules of Civil Procedure.

The demand of the petitioner for a jury trial was made simultaneously with the making of the motion for permission to intervene by writing across the face of the proposed pleading of this petitioner, the legend that petitioner demanded a "trial by jury". This was the first entrance

of the petitioner into this case. Therefore, the time of making this demand, insofar as this petitioner was concerned, was well before the expiration of the time to demand such right as required by Rule 38a. The courts below recognized the timeliness of the demand for they did not dispute it. They recognized, too, that the action was an ordinary common law suit for a money judgment in excess of twenty dollars, for they did not dispute this fact either. The discussion of the facts in the decision of the Trial Court and of the Court of Appeals confirms the common-law nature of the action and of the counterclaim. Yet, both courts decided to deny the right of the petitioner to a jury trial. The District Court did not express its reasons except that on the oral argument it stated that a case such as this can be better tried by a judge without a jury. The Court of Appeals, however, went further and placed the waiver upon a ground which it inferred from its own examination of the papers submitted to the District Court, but which, it must be respectfully stated is not supported and does not logically follow from the facts relied upon by the court. Nevertheless, the constitution does not admit exception to the right of a party to demand a jury trial. Its command is "the right of trial by jury shall be preserved". An exception would violate the constitutional mandate. Either the court is right or the constitution is. The court would impose limits upon the right where the constitution does not. Indeed, the constitution places a ban upon the exercise of the judiciary powers of the Government and that ban is all inclusive. It relegates all such trials to a jury, not to a judge. It does not contain any ground upon which the District Court can say that, in its opinion, the case can be better tried by a judge without a jury. Nor, does it contain any words that allow the Court of Appeals to say that a demand for a jury trial can be stricken whenever the court decides that its use was a means at delay. Petitioner can rest its argument that this petition should be granted upon the plain and obvious

words of the Seventh Amendment; but there are decisions of this court which have had occasion to expound upon the importance of that right under various circumstances although none considered the case where the party seeking the right to a jury trial was also seeking to intervene in the action. As recently as in April of this year this court had occasion in *Dairy Queen Inc.* v. *Wood*, 369 U. S. 469, to hold that the denial of a jury trial posed an important problem which this court would take under advisement. It held that there a trial by jury on legal claims had priority over equitable claims triable by a court, even though there seemed to have been some confusion in the pleadings filed as to the true nature of the cause of action. This court took occasion to note that the principle that a litigant should not be deprived of his right to a jury, is a long established principle. This court also decided a great many cases of which the following are but a few, which upheld the inviolability of this right of a litigant.

Beacon Theatres Inc. v. *Westover*, 359 U. S. 500;
Scott v. *Neely*, 140 U. S. 106, 110, 117;
Cates v. *Allen*, 149 U. S. 451;
Thompson v. *Railroad Companies*, 6 Wall. 134;
R.F.C. v. *Bankers Trust Co.*, 318 U. S. 163, 170;
Hodges v. *Easton*, 106 U. S. 408, 412;
Galloway v. *U. S.*, 319 U. S. 372, 396, 411.

In *Hodges* v. *Easton*, *supra*, this court stated that a party may waive its right to a jury trial but that right can never be taken away from him. Also, this court stated in *R.F.C.* v. *Bankers Trust Co.*, *supra*, at page 170, "In actions at law the jury is the traditional trier of facts, whose function as such is preserved and guaranteed by the fundamental law."

In this case both the lower courts demanded that the waiver be made and as such, the waiver was not a voluntary act of the petitioner, but was instead a surrender of its

right of trial by jury, forced by judicial decree. A waiver, has been said by this court, must be factual, it cannot be fictitious. There must be a surrender, not resistence.

Freeman v. *Bee Machine Co.*, 319 U. S. 448, 459.

The right of the intervenor under Rule 24 (a) of the Rules of Federal Civil Procedure was a matter of right not a matter of discretion with the court below. The petitioner in intervening had a counterclaim to prosecute. This could not be done by the surety in its own defense of the action brought by the use-plaintiff. Also, a decision in the action against the surety alone would be *res adjudicata* of the rights of the petitioner against the use-plaintiff.

U. S. for the Use of Foster Wheeler Corp. v. *American Surety Co.* (2 C. A.), 142 F. (2) 726.

It is obvious, that the surety was not in possession of the facts of the case but that the petitioner was and that, therefore, the surety was not in the best position to defend against the action. Both courts recognized petitioner's right to intervene. They did not base their denial of a jury trial upon a claimed right to a use of discretion as to whether or not to let the petitioner into this litigation. Rather the Court of Appeals, it is respectfully submitted, took it upon itself to punish petitioner because of a supposed claim of delay. Yet, examining the record, as this court can very well do, because there is here involved a constitutional question and this court is not precluded from examining the facts to determine whether there is evidence to support the conclusion, we find that the court went out of its way to call the petitioner names without having any basis in the facts for its decision. There was no delay attributable to this petitioner. True, this action was commenced in April, 1959 and issue

was joined late in August, 1959. The time between was spent by the parties in serious endeavors to settle the litigation (3s-4s). This time then was spent more in looking toward the conclusion of the litigation rather than in extending its life. Accordingly, this period of time spent could not be charged to the petitioner. Furthermore, the suit was one commenced by the use-plaintiff and it had elected to name the surety only as a party defendant. It must have expected that the petitioner would intervene. In the meantime, only the surety was obliged to do anything about the suit. The surety filed its answer as late as August 30, 1960, having had the consent of the use-plaintiff to extensions of time. The petitioner began the preparation of its petition immediately after the filing of this answer. The petition was completed by September 6, 1960. The proposed pleading was not prepared by that date. However, while being engaged in the preparation of the pleading and before all of the supporting papers were ready, the use-plaintiff served notice to take the deposition of intervenor although it was not yet a party (4s). Accordingly, further work on the preparation of the papers to intervene was suspended, to await the outcome of this proceeding, initiated and prosecuted by the use-plaintiff (4s). The notice of taking the deposition of petitioner was returnable October 21, 1960. The petitioner appeared on that day and on that date the deposition was taken. A copy of the deposition was not received from use-plaintiff until November 15, 1960 (4s). The motion to intervene was filed November 25, 1960 (1s). This then is not the action of one who would delay for delay's sake. Without specification, the Court of Appeals seems to have concluded that there were all manner of delaying tactics employed by the intervenor at this point, yet the only action taken by the intervenor was to appear for the pre-trial deposition at the time set by use-plaintiff and immediately thereafter it moved to intervene in this action. If the use-plaintiff wanted to

have hurried the proceedings it could have named petitioner as a party defendant. Then a default would have been noted if the answer were not timely filed. The use-plaintiff preferred to proceed against the surety alone and it must have contemplated the action of the petitioner to intervene. The petitioner could not intervene until the pleadings were closed. In any event, by intervening; it was not intended that the trial which the use-plaintiff wanted would be delayed for a trial could have been set for the same day as was actually set and yet, the right of trial to jury could have been preserved. Accordingly, the conclusion of the Court of Appeals is without basis or foundation in the facts and there is no fact to support it. The only fact that is mentioned by the court was a scratching out of the date September 6, 1960, in the petition, but this act is explained as being caused by the fact that use-plaintiff served its notice to take the pre-trial deposition of the petitioner while the papers were being prepared. It was not caused by any intent to delay the trial. The scratching was not complained of by the use-plaintiff. The Court of Appeals, on its own motion, noticed the change and jumped to the conclusion of delay. This conclusion does not follow from the action noted. It is illogical to conclude from one particular event which admits of many possibilities, one of many generalizations. Many other inferences can be drawn from this act among them the explanation given, which was the truth. In the district court, petitioner submitted an affidavit explaining these events (2s-8s). No contradiction of these explanations were made by use-plaintiff. The Court of Appeals apparently overlooked this affidavit of the petitioner.

The nature of the language used by the court is indicative of its not being sure of the facts. It makes general accusations of dilatoriness and states that it is "all too plain", in an accusing tone, and it makes another accusation that intervenor had "an ace in the hole". This

is a pure figment of the imagination of the court. How could petitioner have "an ace in the hole" by intervening and demanding a jury trial. What intervenor did was lawful. How could it be "an ace in the hole" or "all too plain". To intervene and to demand a jury trial are vested rights. They cannot be called unlawful when they are not and least of all by calling them names that have no meaning or any basis in the facts. Rather, the decision seems to stem from an arbitrary decision not to recognize this valid right given to the petitioner under the Constitution. Probably, this is a by-product of the court's conviction on the merits of the case, which is also a conviction which is not based upon any fact in the evidence on the trial. Such conviction was probably induced by the strong and relentless attacks of the appellees upon the creditability of the petitioner, which attacks are based not upon the evidence but upon name calling and maligning references to improperly drawn inferences from subsidiary facts not subject to those inferences. This matter is being explained in point "II" of this petition. It must be kept in mind that the proceedings below was not created by the petitioner. Instead the petitioner has been caught in a swirl of a series of erroneous judicial action stemming from the unlawful denial to a jury trial and the relegation to an unconstitutional court. The fact that further delay may be experienced by the parties to this case after this court confirms the right of the petitioner to a jury trial was envisaged by the Congress for it specifically provided for appeals only from the final decision.

Roche v. *Evaporated Milk Asso.*, 319 U. S. 21, 30; *U. S. Alkali* v. *U. S.*, 325 U. S. 196, 202, 203.

Consequently, this court is urged to examine the decision of the Court of Appeals in finding exceptions to a trial by jury in this case on both the law and the facts.

Baumgartner v. *U. S.*, 322 U. S. 665, 670, 671; *U. S.* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 404.

In the foregoing two cases this court stated that whenever a constitutional question is involved, the court will look to the evidence to see if there is support for the conclusion.

Petitioner respectfully prays this court to grant certiorari because of the importance of the right of a trial by jury which right has been denied to petitioner in clear violation of the constitutional mandate and because this court as the guardian of constitutional rights and guarantees should speak on the subject of the lawfulness or unlawfulness of denying this guarantee to a litigant who is entering a suit by way of the intervention statute or is being unjustly accused of delaying tactics. This court has said: "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U. S. 486. This very aptly describes the need in this case.

II. Should this court refuse to review the denial of a jury trial, then it is respectfully submitted that this court should review the merits of this case because the Court of Appeals has improperly applied the "clearly erroneous" rule, or has applied it in such a way which is in conflict with the applicable decisions of this court.

Petitioner is not unmindful of the "two court" rule and the reasons for invoking it. See *Hart & Wechsler*, The Federal Court and The Federal System, page 1390. Yet, petitioner feels that where the Court of Appeals has sanctioned a misapplication of the law, or has, with the trial court refused, to be bound by the conceded evidence or by the uncontradicted evidence, then an old-fashioned error

of law has been committed which is within the ordinary power of this court to correct. May not the "two court" rule nevertheless, apply? Perhaps, but in this case, it is petitioner's belief that the Court of Appeals has not properly applied the "clearly erroneous" in violation of its duty as an appellate tribunal and in violation of the rule as established by this court in *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395. This court there said that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." If note is taken of the words "on the entire evidence" one must conclude that this court meant that the reviewing court must read all the evidence in the case. As the decision of the trial court is based upon surmise and speculation, for there was no evidence to support it, and as there was evidence contrary to the court's findings which evidence was conceded or stood alone and uncontradicted, and as the Court of Appeals, too, followed the same findings of the trial court, it is inferable that the failure of the Court of Appeals to find what was clearly in the record could only be due to a failure to see it. This together with other reasons which will be set forth hereinafter impels an inference of a failure to consider all the evidence that was in this case. Hence, the "clearly erroneous" rule was improperly applied. True, the Court of Appeals states that it went through the record of this case. Yet, its decision is not an independent expression of findings based upon specific subordinate facts. It is a generalized approval of the facts found by the trial judge with an acknowledgement of that judge's patience and long years of service. The Court of Appeals' harsh language also appears to be a substitute for an independent investigation and consideration of the facts. It seems likely that the Court of Appeals only read that part of the record made by the trial court's caustic treatment of petitioner's evidence as it was going into the record at

the time of trial, which extended for more than nine hundred pages of testimony when it became saturated with animosity toward petitioner's cause and it let the balance of the seventeen hundred pages of testimony go unread or at best, not thoroughly understood. The test of a conclusive finding is to find support in the evidence for it, to see if there is any "substantial" evidence to support the trial court's decision.

I.C.C. v. *Louisville & Nashville R.R. Co.*, 227 U. S. 299;
Stern, *Review of Findings*, 58 Harv. L. Rev. 70, 75.

The duty of the court is to examine the record as a whole, not only to rely upon the general good reputation of the trial judge. It is to ascertain whether there is any substantial evidence to support the decision under review, from the record as a whole.

Consolidated Edison Co. v. *N.L.R.B.*, 305 U. S. 197, 229;
Galloway v. *U. S.*, 319 U. S. 317, 372, 396;
N.L.R.B. v. *Columbian Co.*, 306 U. S. 292, 300.

The petitioner pointed out to the Court of Appeals that the trial court erred:

a. In finding the nature and terms of the contract of sale, in that it disregarded the conceded and uncontradicted evidence of the parties.

b. On use-plaintiff's performance of the contract, in disregarding use-plaintiff's lack of proof and in disregarding the defendant's proof on the point which was the only proof of the fact.

c. On the law applicable, in disregarding the use-plaintiff's burden of proof of the contract sued on and of its

performance, as a condition to its recovery of the contract price and in place thereof, applying a so-called "substantial" performance rule and by this means it placed the burden of non-performance on the buyer.

Hence, errors of law were advanced which are, nevertheless, examinable in this court.

> *Palmer* v. *Conn.*, 311 U. S. 544, 558;
> *Baumgartner* v. *U. S.*, 322 U. S. 665, 670, 671;
> *Morimurai Ara* v. *Taback*, 279 U. S. 24, 33;
> Stern, *Review of Findings*, 58 Harv. Law Rev., 70 (1944), 89, 90, 113.

Stern says at page 113, "Public interest does not require that the Appellate Court accord any degree of finality to the judgment of the trial court as to application of law to facts, but points the other way."

Further, this Court says "to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests for that fact."

> *U. S.* v. *Appalachian Electric Power Co.*, 311 U. S. 405.

A comparison of the decision of the trial court with the decision of the Court of Appeals will bear out petitioner's position.

As to the Nature and Terms of the Sales Contract of the Parties

The trial court found that the contract consisted of the single writing marked Plaintiff's Exhibit 5, a letter written by use-plaintiff on January 29, 1959 and signed by petitioner on February 2, 1959. The Court of Appeals found the same fact.

Yet, the conceded and uncontradicted facts show that this letter alone does not constitute the whole of the agreement between the parties. The whole contract shows that the timbers to be supplied were to be used in the fender sysem being required under the contract between petitioner and the United States Government and it was the intention of the parties that the timbers were to be fabricated by use-plaintiff to such an extent that all petitioner would have to do to the timbers, when received, was to assemble them together and hang them over the side. The timbers, fabricated as specified by the government specifications and drawings, and by the government approved shop drawings would have been made ready for such an assembly operation. Anderson for use-plaintiff testified to such effect. Gustavsson for petitioner also testified to such effect. Hence both parties were in agreement on this intention of theirs.

Both parties also testified that Exhibit 5 was only a confirmation of the previous writing dated January 16, 1959, which was marked Defendant's Exhibit 2. Exhibit 5 says that it confirms Exhibit 2. Exhibit 2 is also a letter written by use-plaintiff and signed by petitioner. The letter is dated December 16, 1958, but petitioner signed it on January 16, 1959. Hence they referred to it as a January 16, 1959 paper. This Exhibit 2 refers to the government contract. It is use-plaintiff's offering to supply the lumber for the fender system. The government contract was in evidence as Exhibit 1. The government's specifications for the lumber was marked Defendant's Exhibit M. The government drawings of the specifications for the lumber were marked Defendant's Exhibit N. The government approved shop drawings for the lumber were marked Plaintiff's Exhibit 4. Also there was a letter from use-plaintiff dated January 16, 1959 confirming acceptance of the order and it was Plaintiff's Exhibit 3. There was a letter from defendant dated January 24, 1959 which informed use-plaintiff that the timbers required had to

conform to government specifications. This was marked Defendant's Exhibit A. There was a letter from use-plaintiff written to the U. S. Navy on January 27, 1959 confirming the sale of the timbers to petitioner and requesting the Navy to inspect the material which was written in accordance with the contract. This was marked Defendant's Exhibit J. Finally there was a copy of the Navy's letter of January 27, 1959, written to their Pennsylvania personnel requesting an inspection, which copy had been sent to use-plaintiff in evident acknowledgment of use-plaintiff's letter of January 27, 1959. This was marked Defendant's Exhibit E. All of these writings and the oral testimony of Anderson and of Gustaysson spoken of above was urged upon the Court of Appeals as proof of the contract between the parties. See intervenor-appellant's reply brief, pages 12-18 inclusive. Citations to the pages in the transcript of the testimony were faithfully made. Yet, there is not a sign of recognition of any of these writings or of the conceded oral testimony in either decision of the courts below.

Citation was also made to the case of *U. S.* v. *Morley Construction Co.*, 98 F. (2) 781, 786, as authority for the rule that where a subcontract refers to the main contract between the government and the general contractor, then the parties to the subcontract are considered to have adopted the terms of the main contract. Anderson's testimony is even set out in full at pages 15-16 of said brief. All this was wholly ignored by the Court of Appeals.

As to the Nature of Plaintiff's Performance

The importance of understanding this intention of the parties to this contract is that then the quality of performance of its contract by the seller is made clear. In this case, use-plaintiff made no proof that the timbers were so fabricated that they could be joined together and put over the side. The only proof of the quality of the fabrication of the timbers was that made by petitioner and that

proof was of timbers improperly fabricated or not fabricated at all. Petitioner's witnesses stated that the lengths of the timbers were uneven. The ends of the timbers were not squared off. The bevels were on the wrong side of the timbers or were missing. The chamfers were too shallow or missing. The dadoes were too small or missing. There were no holes. To do all this extra work a prior assembly operation was necessarily performed. These conditions were observed and testified to without contradiction. Thus the quality of the fabrication, if related to the contract of the parties as evidenced by the conceded testimony as to what the intention of the parties was, became important. It was nevertheless ignored below. Hence, petitioner's evidence that the timbers delivered were not as agreed upon, that they were not suitable for the purposes intended by the parties, was ignored and probably not understood at all. In addition to the testimony as to what they saw regarding the timbers as they were delivered to the job-site, petitioner's witnesses also described in detail the work performed by petitioner's work force to make the timbers suitable for the purposes intended. This latter testimony was that the work was performed continuously between May 22, 1959 and December 1, 1959. Then the work was resumed in April, 1960 and continued to May, 1960. See pages 20 to 30 inclusive of the reply brief aforementioned. In testifying about what fabrication was done by the petitioner the witnesses stated the nature of the work done, whether chamfering, cutting dadoes, squaring ends or cutting to even lengths or drilling. The work done on each day was described. The number of employees employed was specified and the number of total hours on the separate parts of the work performed was given. None of this testimony was contradicted. It was all ignored.

The use-plaintiff simply relied upon the fact that delivery of the timbers was conceded by petitioner as proof of its performance. An attempt was made to show an excuse for late deliveries and to show some inspection made

at Pennsylvania, but the fact that deliveries were late is conceded, and the fact that an inspection made at Pennsylvania is not probative of the quality of the fabrication at the job-site is obvious. The seller's obligation was to deliver the timbers fabricated as specified to the job-site. Recognizing this insufficiency of proof, the trial court applied the "substantial" performance rule usually applied to construction contracts to excuse this lack of proof of the use-plaintiff. Yet, the rule in sales where the seller sues for the contract price is for the seller to prove performance of its contract according to its terms before he may recover.

Sec. 260, Restatement of the Law-Contracts;
Sec. 92, Subd. 2, Personal Property Law;
Sec. 122, Personal Property Law;
Frankel v. *Forman* (2 C. A.) 33 F. (2) 83;
Thomson Co. v. *International Compositions Co.*, 191 App. Div. 553; 181 N.Y.S. 637;
John Tull's Sons, Inc, v. *Williams Engineering Contract, Co.*, 136 App. Div. 710; 121 N.Y.S. 478;
News Syndicate Co. Inc. v. *Gotti Paper Stock Corp.*, 256 N. Y. 211;
Riduss, et al. v. *Polcoff*, 175 N.Y.S. 756.

Though delivery of the goods was conceded, delivery alone does not comport with acceptance, which in the final analysis is a burden of the seller to prove.

3 *Williston on Sales;* Rev. Ed., Section 485.

On the question of use-plaintiff's performance, the trial court said, "It should be said at once that the burden of proof is upon defendant, plaintiff having shown delivery of what it contracted to provide as will be demonstrated." The court, however, failed to "demonstrate". There is nothing in that opinion which states the condition

of the timbers at the job-site. More importantly it placed the burden of proof on the wrong party. It was the use-plaintiff which was seeking the contract price. It had pleaded a contract of sale. It had even pleaded a modification of that contract, viz.: that for twenty cents per hole the petitioner would take over the drilling of the required holes in the timbers. *Allegata et probata.* This principle was not alone not mentioned; it was not even acknowledged. The trial court in placing the burden of proof upon the defendant contradicted the principle. The court relied upon:

> *U. S. etc.* v. *Wunderlich Contracting Co.*, 228 F. (2) 65 (p. 68);
> *U. S. etc.* v. *American Surety*, 142 F. (2) 726 (p. 728);
> *U. S. ex rel. Johnson* v. *Morley Const. Co.*, 98 F. (2) 781 (p. 789);
> *U. S. etc.* v. *McCay*, 28 F. (2) 777 (Point 10, p. 780).

None of the foregoing cases support the court on the burden of proof. They state the "substantial" performance rule, not a burden of proof rule. The substantial performance rule may be likened to the separable contract rule. The burden of proof rule is stated in the authorities set forth herein by petitioner. The trial court even failed to find any subsidiary fact to support the substantial performance rule. As a result of this improper reliance, the trial court, without evidence of performance of delivery of the goods according to the terms of its contract of sale allowed use-plaintiff to recover the contract price.

The Court of Appeals affirmed, even adding a case of its own restating the substantial performance rule, without acknowledging the true problem of deciding whether or not the burden of proving performance was

with the seller. It stated its position colorlessly as: "On this state of the record, we think the trial judge quite properly applied the doctrine of substantial performance." On what state of the record, can very well be asked. There is no discussion of the necessary subsidiary facts which could support such a mixed question of law and fact. Neither court attempts to discuss these subsidiary facts. Necessarily, they would be that the timbers were of such sizes, that they were dadoed and chamfered and bevelled and squared as required. The courts, both trial and appellate, do not premise that finding on such necessary evidence and, for a very good reason. There is no such evidence in the record. This is one of the reasons why petitioner feels that there was a failure to consider the whole case.

The treatment of the drilling of the holes is another reason. The Court of Appeals merely repeats what the trial court said and it, too, overlooked the law applicable. The trial court stated that because there was no agreement on the charge which petitioner was to make for the drilling that he must take the twenty cents at which plaintiff said it would do the drilling. The Court of Appeals said the same thing. Yet, the fact of the matter is that use-plaintiff pleaded performance of the sales contract as modified by a later agreement whereby petitioner was to do the drilling and use-plaintiff was to allow a twenty cent per hole credit therefor. Here, then, the use-plaintiff was recognizing that even if its contract stated that it had agreed to do the drilling for twenty cents per hole, it could not say, in the absence of an express agreement, that it could bind petitioner to the twenty cent charge for taking over the drilling. It recognized that when petitioner took over the drilling a new contract was made; that unless the consideration for the drilling was expressly stipulated at twenty cents per hole, it could not bind the petitioner to that amount. Consequently, use-plaintiff pleaded the modification that petitioner would

do the drilling for twenty cents per hole. In fact, in support of its pleading, the use-plaintiff offered proof of such an express agreement. The trial court did not accept that proof, however. It found instead that the parties had not come to any agreement on petitioner's charge for the drilling (20s). This was an acceptance of petitioner's position which was that no price had been agreed upon because the petitioner could not know its cost until he had done the work. Then, instead of allowing petitioner a fair and reasonable value or perhaps its cost of the drilling operation, the trial court allowed the twenty cents which plaintiff was claiming. The Court of Appeals in general terms and without discussion of the problem of proof and of the law of damages which allows a *quantum meruit* recovery where no price is stipulated, found that the twenty cent credit allowed by the trial court was proper.

The handling of the petitioner's claim for delayed delivery, by the Court of Appeals, too, was a mere repetition of what the trial court had said without adverting to the conceded facts of delay or to the arguments advanced by the petitioner in its appeal. Here it could be said that there is a complete failure to understand the facts. The Court of Appeals' statement that there was no "credible evidence" to establish the amount of delay means that even use-plaintiff's evidence of the dates of delivery were incredible. These dates were conceded. Delivery was conceded. It would not take much calculations to compare these delivery dates to the stipulated dates of deliveries and arrive at the number of days the deliveries were late. It is apparent that the failure to read here was not only of the evidence but also of appellant's point on the subject.

The use of name calling by the Court of Appeals, too, is indicative of its failure to understand all the evidence. If it did understand, it would have no need to call names.

The treatment of the question relating to the appeal from the order striking the name of the surety as an appellant also, indicates that the Court of Appeals had not understood petitioner's brief on this head. Petitioner had stated that that matter would be important only if there was a reversal from the judgment in favor of the use-plaintiff. As there was an affirmance, that matter did not have to be considered. Yet, the Court of Appeals devoted a great deal of time to it and reserved some of its choicest language to ridicule an argument of law, which, because it was not held in sympathy at the moment, probably eluded the court. It made fun of petitioner's claim to a denial of due process. Yet, the court does not talk of the reason why the claim was made. Instead, it finds that a certain notice of proceedings to the petitioner was sufficient, when petitioner had, all along, conceded the sufficiency of that notice. The petitioner had complained that it had had no notice of a later consideration of the matter, but of this, the court does not say a word. It merely found fault with petitioner's position anyway. Still another thought on the subject is the fact that the Court of Appeals said, "As Judge Byers credited the testimony of the witnesses for the lumber company and did not believe the testimony of Gustavsson's witnesses, we are at a loss to discover any basis for reversal of the judgment on the merits." This position was strangely enough put forward by the Court of Appeals upon the argument of the appeal. It did not want to hear the argument on the merits. It gave generously of its time on the argument, limiting the discussion, however, to procedural questions. As to the merits, the court seemed intent on not disturbing the findings of this very fine trial judge. It was difficult for appellant to say anything about the arbitrariness of that judge as he had died shortly before the argument.

This attitude of the Court of Appeals expressed openly on the hearing, confirmed in the foregoing excerpt from its decision, gave birth to the idea that the Court of Ap-

peals had not properly applied the clearly erroneous rule, as it probably did not examine the facts to see if petitioner's claims that there was no support for the trial court's findings or that such findings were against the conceded evidence and, in some cases, against the only evidence on the subject, was well founded.

As a matter of fact, the Court of Appeals shows its lack of familiarity with the subsidiary facts in the manner with which it treats the Saladino diary. This was a personal log of the chief engineer of the petitioner, who kept it for his own purposes without instructions from petitioner. It was a fortuitous matter for petitioner to have had in its employ one who was methodical enough to make daily entries of events happening on the job. Petitioner actually had no record of the job performance of its own. The trial court in its decision lambasted (without just cause) the credibility of petitioner's oral testimony. It made disparaging remarks about petitioner not keeping records. It belittled the written notice of claim, Defendant's Exhibit K, but said not a word against the diary. This was in keeping with his view expressed during the course of the trial, that he did not believe that the diary was kept in anticipation of the trial.* This was the nicest thing he had said about petitioner's case and the trial was then four or five days old and the record was some 990 pages long. Although this expression was only a negative expression, it did mean that he believed that the engineer had put down in his diary what he believed had happened during the day. On the other hand, the Court of Appeals, imbued with a sense of outrage (without just cause) against petitioner's cause, but apparently, not knowing this nuance in the happenings at the trial but bent on castigating petitioner's position said, "The most charitable view of what Judge Byers thought of the Saladino log and Exhibit K strongly relied upon by Gustavsson on this appeal, is that they were wholly

* See page 972 of the transcript of the trial.

unreliable supports for Gustavsson's fantastic claims" (36s). Yet, as stated above, Judge Byers did not attack the diary.

Also, further on in its decision, the Court of Appeals referred to petitioner's claim of uncontradicted evidence as, "True it is that Gustavsson himself and Saladino, his enginer, were ready at all times to say they saw this and saw that, * * *" but not a word is said about the testimony of their men and of the government inspector on the job, one Fritzon, who said that Gustavsson's men "worked" in correcting the fabrication of the timbers; that two assemblies of the timbers were undertaken, in the first of which the men prepared the lumber in the manner called for by use-plaintiff's contract and that this work was done between May 22, 1959 and December 1, 1959 and continued in April, 1960 and in May, 1960. The nature of the work was minutely spelled out, on a day-to-day basis, on the cross-examination of both Saladino and Gustavsson. On a given day, the witnesses said they were drilling or were layout out the timbers or were dadoing or were chamfering or cutting down, or a combination of all these operations were performed, either alone or in conjunction with each other or with other work. Always the number of men employed in a given operation was given and the specific number of hours spent in the separate operations performed during the day was stated. There was not a word of denial of this regimen of work, from use-plaintiff. Yet, it is Mr. Anderson's claim that he visited the job several times a week through this period. This testimony is spread over more than 1,000 pages of the testimony. The Court of Appeals does not mention it. The petitioner made a point of it. In fact, it tried to emphasize this as its central point for reversal.* All that work, it was thought, could not escape the attention of the Court of Appeals, as it, apparently, had the attention of the trial judge. One can

* See pages 20-30 of Appellant-Intervenor's Reply Brief with particular reference to pages 21-22.

hardly open the transcript of the trial at its median pages without finding an explanation of what part of this work was being done, which day it was, whether the work was done in the morning, afternoon or whether it had occupied the whole of that day and how many men and how many hours were so employed.

The amount of this work done lies at the bottom of petitioner's strength in resisting this claim. Use-plaintiff had recognized its liability, otherwise it would not have tried to agree to try to settle this case in that long period of time between April and August, 1959. On the trial, its witnesses stated that they had offered to pay petitioner for the corrective fabrication and to replace the damaged timbers. The trial court had said that there had been a failure on the part of the petitioner of proof. It suggested that that proof should have shown the specific timbers affected and what specific work was done to each such timber. The separate timbers were not identified by number or name and no specification of identity other than that they belonged to one of four groups, according to their sizes, was present. How could this identification then take place? The work of this prior assembly was confirmed by Fritzon, the Government inspector, and by the daily work progress reports he had made. He had identified the Saladino log as an accurate record of the way the job had progressed. This log, too, showed the work in quite detailed form. Yet, not a word of understanding is stated by the Court of Appeals on this all important point. The use of strong language in characterizing the petitioner and even the attorney is uncalled for. It is abusive of the parties attacked. It is not descriptive of the facts in the case. There is no record of any action of the petitioner, its officer or its attorneys which would motivate the courts in their choice of language. Without doubt, such language was probably chosen to cover the weakness of their judicial discernment. The record speaks for itself and therein it is clear that there is no support for the abusive language used by both courts below and no support either for the findings of so-called

"substantial" performance by use-plaintiff. Nor was there any recognition by the courts below of the conceded and uncontradicted facts of what the nature of the contract was and of the failure of use-plaintiff to perform its contract. Petitioner, consequently, feels that these failures of the Court of Appeals lead to the conclusion that it had failed to apply the "clearly erroneous" rule properly.

As stated above, this point II is being made only in the event that this court does not wish to review the denial of a jury trial. It is submitted, that the handling of this case shows a proneness to go along with the trial court's findings. That the Court of Appeals may find that there is supporting evidence for the decision of the trial court in spite of the appellant's urging that there is none, of course, does not excuse the court from examining the record whenever the merits of the decision of the trial court is under attack. It is the duty of the reviewing court to be sure the trial court had not acted arbitrarily, or made a mistake of law. As this court has the right of such an examination and even the duty of supervision, and, as in this case, a gross miscarriage of justice has occurred in that a workman is not paid for work performed but a contracting party is allowed his full contract price in spite of a lack of proof of his own performance, a miscarriage of justice which could have occurred only by reason of judicial failure, it is respectfully submitted, that it would serve the national interest if this court would examine the subsidiary facts and right the wrong that has been done here, in reminder to the appellate courts that their duty is not done unless they themselves discover the supporting facts in the record for the decision of the trial court.

WHEREFORE, petitioner prays this court to issue its writ to review the decision of the Court of Appeals affirming the judgment below.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney for Petitioner.

United States Supreme Court

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO. INC.,

Plaintiff-Respondent,

against

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Defendant-Respondent,

and

OVE GUSTAVSSON CONTRACTING CO. INC.,

Petitioner and Intervenor-Appellant.

Statement of Appropriate Docket Entries.

August 30, 1960	Answer of Massachusetts Bonding & Insurance Company
October 6, 1960	Notice of Taking Testimony
November 15, 1960	Note of Issue and Statement of Readiness
November 21, 1960	Affidavit of Non-Readiness
November 21, 1960	Notice of Taking Testimony
November 25, 1960	Notice of Motion to Intervene
December 8, 1960	Stipulation Adjourning Motion
December 16, 1960	Pre-Trial Proceedings
December 21, 1960	Affidavit of Anthony B. Cataldo
December 21, 1960	Affidavit of Philip G. Fitz
January 5, 1961	Decision of Judge Mishler on Motion to Intervene Served November 21, 1960

Petitioner's Demand for Jury Trial Inscribed on Its First Pleading in This Action Attached to Motion to Intervene.

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO., INC.,

Plaintiff,

against

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

Defendant,

and

OVE GUSTAVSSON CONTRACTING CO., INC.,

Intervenor.

INTERVENOR'S PLEA.

TRIAL BY JURY DEMANDED

Reply Affidavit of Anthony B. Cataldo, Read in Support of Petitioner's Motion to Intervene.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANTHONY B. CATALDO, being duly sworn deposes and says that he is the attorney for the intervenor, Ove Gustavsson Contracting Co. Inc., and makes this affidavit in reply to the affidavit of Philip G. Fitz dated December 14, 1960 which allegedly is in opposition to the intervenor's motion to intervene in this litigation. At the outset, deponent wishes to correct the word "plaintiff" to the word "intervenor" at page "2" at the 15th line from the top. The claimed damages are due to the intervenor, not to the plaintiff. The word "plaintiff" was written in error and it should be corrected.

Contrary to what Mr. Fitz says about laches, there were no laches on the part of this intervenor. Though this action was commenced in April, 1960, the parties had been discussing the matter for the purpose of settlement for months before issue was finally joined.

Many efforts were made to settle this litigation by your deponent. Complete particulars of the claim of the general contractor against this use-plaintiff were given to the use-plaintiff. The claims were broken down in great detail and Mr. Fitz and his client visited the job-site, in the company of your deponent, in an effort to prove to them the amount of work that was necessarily done by the intervenor to correct the dressing which the use-plaintiff was supposed to have done to the lumber. On this visit, it was arranged for them to talk to one of the government inspectors who had rejected lumber and who confirmed that part to Mr. Fitz and his client. At least, two conferences were held at deponent's office. A third conference was held in the Court House. The intervenor's claim for damages and for delay amount to $23,500. It was an important

item for the intervenor and for that reason your deponent was quite anxious for Brown & Bryan Lumber Co. Inc. to understand the facts. Therefore, he submitted in support of the claim even the bills of his own supplier for services rendered and materials furnished in an effort to show the cost to the intervenor of correcting the lumber which had been wrongfully fabricated by the use-plaintiff. Yet, with all this attention and effort, the use-plaintiff remained arbitrarily unconvinced and offered to pay some $2,000. on account thereof. Consequently, when it became apparent in August that the settlement talks were not bearing any fruit, an answer was put in by your deponent in this case. Inasmuch as this suit was commenced against the surety only, the answer was put in on behalf of the surety. Subsequently; and while plaintiff was preparing the present motion to intervene, your deponent received a notice of deposition which the use-plaintiff wanted to take of the general contractor. Your deponent thereupon decided to await the outcome of the deposition before filing the motion. The deposition was taken and the transcript finally received by deponent on or about November 15, 1960. By November 26, 1960, your deponent completed the preparation of this motion, had the same executed by the intervenor and served it upon the use-plaintiff, making the same returnable at the earliest possible motion date, which was December 7, 1960. Two days before the said return date or on or about December 5, 1960, the use-plaintiff requested an adjournment of two weeks and presented a stipulation for signature, adjourning the motion to December 21, 1960 which brings the matter to date. The intervenor never delayed this matter and there can be no claim of that sort here. The use-plaintiff knows this. As a matter of fact, Mr. Fitz in a conversation before Judge Rayfiel on another proceeding in this matter, conceded that the intervenor should intervene and that he would not oppose this motion. That proceeding came

about by the fact that immediately after the transcript of the deposition was delivered to deponent and before deponent had an opportunity to take the deposition in discovery proceedings of the use-plaintiff, the use-plaintiff filed a notice of issue. Whereupon, your deponent filed an affidavit of non-readiness. A hearing was held upon the affidavit and the same was heard before Judge Rayfiel on November 22, 1960. It was explained to Judge Rayfiel that your deponent wanted to intervene in behalf of the general contractor and that he was then preparing the papers, and also, that he wanted to examine the use-plaintiff before trial. Mr. Fitz at that point, stated that he would have no opposition to the motion to intervene or to the taking of the deposition and on that account, the Judge said that since the trial could not be had anyway, before February, that that fact would give deponent sufficient time to proceed as planned. The pre-trial deposition of the use-plaintiff has been taken, while the motion to intervene, as stated above, is still before the court, undecided.

The matter to intervene is of great importance to the ends of justice for it would defeat plaintiff's cause of action. Therein lies the true objection of the use-plaintiff. In an action under the *Miller Act* such as this is, the general contractor has been given the right to intervene, if the surety alone is sued by the sub-contractor.

U. S. for the use and benefit of Poster Wheeler Corp. v. *American Surety Co.*, 142 F. (2) 726

The reason behind this is that in suing the surety alone, the surety is not able to defend on the basis of the defenses open to its principal, the general contractor, or rely upon the counterclaims which may be made by the general contractor, unless the general contractor is a party to the action.

Ettinger v. *National Surety Company*, 221 N. Y. 467, 470
Lasher v. *Williamson, et al.*, 55 N. Y. 619, 620
Elliot v. *Brady*, 192 N. Y. 221, 225
Gillespie v. *Torrance*, 25 N. Y. 306
Adamson v. *Adamson*, 251 App. Div. 187; 295 N.Y.S. 506, 510

There is lack of privity between the surety and obligee in the contract between the obligee and principal and this lack of privity prevents the surety from interposing either the defenses or the counterclaims of the principal against the obligee.

Wilton Mfg. Co. v. *Machinery & Metal Sales Co.*, 174 N.Y.S. 766
City of New York v. *Fidelity & Deposit Co. of Md.*, 253 App. Div. 676, 3 N.Y.S. (2) 714, 716, 717
Turner v. *Edison Storage Battery Co.*, 248 N. Y. 73
Guilane v. *Philco*, 98 N.Y.S. (2) 24

In *City of New York* v. *Fidelity & Deposit Co. of Md.*, supra, at pages 716, and 717 of the Supplemental Report, the Appellate Division said:

> "The action here is brought against the surety alone; hence the surety cannot avail itself of the claim of its principals against the plaintiff, City of New York. The rule is well established in New York State that, where a surety is sued alone, he can not avail himself of claims of the principal against a creditor. Gillespie v. Torrance, 25 N. Y. 306, 83 Am. Dec. 355; Lasher v. Williamson, 55 N. Y. 619; Elliot v. Brady, 192 N. Y. 221, 85 N. E. 69, 18 L.R.A. N. S. 600, 127 Am. St. Rep. 898. The claim of the principals in this case is not a mere failure of consideration, but an independent

claim and, not being due to the defendant, cannot be asserted by it. Gillespie v. Torrance, supra. If the defendant had the right to assert the counterclaim and have it allowed in this action, where the principals are not parties, it would bar the suit of the principals for the breach of contract. As no balance could be found in the surety's favor, in seeking to cancel plaintiff's claim for $8,295.61, the surety might thus destroy the claim of the principals for $52,700. Gillespie v. Torrance, supra, 25 N. Y. 306, at page 311, 82 Am. Dec. 355; 4 Williston on Contracts, Rev. Ed. ps. 1251 p. 3582."

Therefore, it is obvious that a suit by the sub-contractor who has no rightful claim against the general contractor has been artfully devised and brought against the surety alone, for the purpose of avoiding the defenses and offsets available to the general contractor. The general contractor is materially interested in this suit because of its indemnification agreement to the surety, either by express contract or the law of subrogation. A recovery by the plaintiff against the surety would be tantamount to a recovery against the general contractor, without litigation upon the general contractor's defenses and counterclaims. That, it is respectfully submitted, would work an undue injustice to the real party in interest, the general contractor. No amount of desire on the part of our courts to accelerate the calendar could compensate for the injustice that would be done if a denial to the general contractor of its right to intervene were to be made. Rule 24 of the Federal Rules of Civil Procedure would grant a party the right to intervene "as of right" where "(2) when the representative of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Both conditions are present in this law suit. Nor is the use-

plaintiff's right to bring this action so paramount that this court should deny the general contractor the rights accruing to it under the very contract the use-plaintiff actually contracted and under which it is asserting its right of recovery. As a litigant of equal standing with the use plaintiff, the general contractor should be permitted to come in to defend against that claim and to prosecute its counterclaims against the use-plaintiff. Also, this right should be permitted to be exercised without depriving the general contractor of its right to a jury trial. There will certainly be issues of fact which will be raised and those issues of fact should be submitted to the jury in the regular course of due administration of justice.

The use-plaintiff has alleged no prejudice and as a matter of fact, it could not allege any prejudice, because none has occurred by reason of any alleged delay in presenting this motion to intervene.

WHEREFORE, deponent respectfully prays this court to grant the intervenor's motion to intervene.

(Sworn to by Anthony B. Cataldo on December 20, 1960.)

Decision of Mishler, J. of January 5, 1961 Requiring Waiver of Jury Trial.

Motion to intervene pursuant to Rule 24 is granted upon condition that intervenor waive right to trial by jury, and serve a copy of the pleading attached to the moving papers, together with a copy of the order made pursuant to this decision, within five days after the entry of such order. The intervenor shall be ready for trial when the cause appears on the regular trial calendar for trial.

Settle order on two days notice.

JACOB MISHLER,
U. S. D. J.

Order Entered January 16, 1961 on Decision of Mishler, J. of January 5, 1960 Requiring the Waiver of a Jury Trial.

A motion having been made by Oye Gustavsson Contracting Co. Inc. to intervene in this action pursuant to Rule 24 of the Federal Rules of Civil Practice, and the said motion having come on to be heard on the 21st day of December, 1960,

Now upon reading the notice of motion dated November 26, 1960, the affidavit of Oye Gustavsson sworn to September 6, 1960, the intervenor's proposed pleading, the reply affidavit of Anthony B. Cataldo, attorney for the proposed intervenor, sworn to December 20, 1960, all in support of said motion, and the affidavit of Philip G. Fitz, attorney for plaintiff, sworn to December 14, 1960, in opposition thereto, and after hearing counsel for the above respective parties, and the Court after due deliberation having rendered its decision in writing dated January 5, 1961, it is

ORDERED that the said motion is granted, upon condition, however, that Oye Gustavsson Contracting Co. Inc., the proposed intervenor, waive a trial by jury or any right it may have to a trial by jury herein, by filing with the Clerk of this Court such waiver in writing and serving a copy thereof and a copy of a pleading together with a copy of this order, on the attorney for the plaintiff within five days from the date of the entry of this order, and provided further that the proposed intervenor shall be ready for trial when this cause appears on the regular trial calendar for trial.

Dated: Brooklyn, New York, January 16, 1961.

JACOB MISHLER,
U. S. D. J.

Waiver of Jury Trial Pursuant to Order of January 16, 1961.

The intervenor herein, pursuant to order of this Court dated January 16, 1961 does hereby waive a trial by jury in order to comply with the condition to intervene placed upon it as in said order directed. This waiver however is without prejudice to the right of the intervenor to claim upon an appeal, if any should intervene herein, that the said condition of waiving a jury trial was erroneous.

Dated: New York, New York, January 17, 1961.

ANTHONY B. CATALDO,
Attorney for Intervenor,
Ove Gustavsson Contracting Co.

To:

PHILIP G. FITZ, Esq.,
Attorney for Plaintiff.

Decision After Trial by Byers, District Judge.

(2027)

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 60-C-334

June 12, 1961

[SAME TITLE]

PHILIP G. FRITZ, Attorney for Plaintiff, By: William V. Homans, of Counsel.

ANTHONY B. CATALDO, Attorney for Defendant and Intervenor.

BYERS, D. J.:

This is a Miller Act case in which the Use Plaintiff is Browne & Bryan Lumber Co., Inc., the Defendant is Massachusetts Bonding and Insurance Company, and the General Contractor who has intervened, is Ove Gustavsson Contracting Co., Inc.; for convenience, the first named will (2028) be referred to as plaintiff, and the intervenor as defendant. The Bonding Company, while the nominal defendant, tenders no issues that require decision, for the controversy boils down to the defendant's contention that the plaintiff did not make deliveries in accordance with the contract entered into between these parties.

Decision After Trial by Byers, District Judge.

PLEADINGS

The complaint was filed April 6, 1960 and recited:

(a) A contract between defendant and the United States of December 12, 1958, wherein defendant agreed to furnish all labor, equipment and materials for the repair of the seal wall and replacement of fenders on Pier G in the Brooklyn Navy Yard. It bears number NBy 21183, specification number 21183-58.

(b) A performance bond in the penal sum of $158,768., and a payment bond in the penal sum of $79,384., conditioned for the prompt payment to all persons supplying labor and materials in connection with the said contract, which bond was accepted by the U. S. A.

(c) The entry into sub-contracts between January 29, 1959 and September 16, 1959 by the plaintiff with the (2029) defendant, the total sum payable being $27,723.85 which was said to include a New York City sales tax of $650.09 and a demurrage charge of $15.00.

(d) A modification of the foregoing on May 22, 1959, whereby the drilling of certain holes in the timbers was to be done by the defendant, whereby the contract cost of drilling holes not already accomplished, namely $9,378 holes, was no longer to be charged by the plaintiff against the defendant at the contract rate of 20¢ per hole; thus there was an allowance to the defendant as to such items amounting to $1,875.60, which the plaintiff has not charged against the defendant, so reducing the contract price above referred to, to the sum of $25,848.25; of this sum only $6,000 has been paid, leaving a balance due of $19,848.25 for which payment was demanded.

An answer was filed on August 30, 1960 which, in addition to denials of material allegations in the complaint

including the jurisdiction of the court, alleged that the plaintiff was in default under its contract with the defendant and that the latter is a necessary and indispensable party.

By motion granted January 5, 1961, the defendant (2030) was permitted to intervene and serve and file an answer. On January 18, 1961 there was filed an intervenor's "plea," which alleged that the plaintiff had failed to perform its contract with the defendant in the respects therein enumerated, namely,

> "* * * but the said lumber so delivered, was delivered undressed and unfabricated as specified in said contract, and other lumber was delivered in damaged condition which was duly rejected by the intervenor and the delivery of such part as was tendered was wholly or nearly so, delayed and that by reason thereof, the said use-plaintiff is and has been in default under the said contract."

The pleading continues that the intervenor supplied the necessary lumber and performed the work needed to dress and fabricate the lumber and did

> "incur the expense of supplying certain tools and machinery necessary to dress and fabricate said lumber to make the same fit for the purpose for which it was intended * * *."

Further, that intervenor demanded the delivery of 5,800 board feet of lumber to replace that quantity of lumber which had (2031) been received in damaged condition, and plaintiff's failure to supply.

It is averred that the defendant has suffered or incurred damage as indicated in the sum of $23,500., which has been demanded and refused. By a memo filed April

13, 1961 the sum is restated to be $21,918.56 which is sufficiently close to the original contract price (as reduced) of $25,848.25, to render the counterclaim suspect as being artificially inflated.

The second, separate cause of action is really a repetition of the foregoing.

An amended answer was filed February 9, 1961 in which the contract between the plaintiff and the defendant is pleaded and the alleged breach and default of the plaintiff thereunder, and an appropriate offset is sought.

The trial occupied twelve non-consecutive days between March 6 and April 5.

General Statement

Gustavsson had a contract with the Navy as above recited and in order to acquire timber needed for the fenders, he entered into the contract later to be set forth which gave rise to the issues to be decided. It is important to (2032) bear in mind that defendant's attorney appears likewise for the Bonding Company and while he is presenting the Gustavsson case as attorney for the latter, his client initially was the Bonding Company.

It should be said at once that the burden of proof is upon defendant, plaintiff having shown delivery of what it contracted to provide as will be demonstrated.

U. S. etc. v. *Wunderlich Contracting Co.*, 228 F. 2d 66 (p. 68);

U. S. etc. v. *American Surety*, 142 F. 2d 726 (p. 728);

U. S. ex rel. Johnson v. *Morley Const. Co.*, 98 F. 2d 781 (p. 789);

U. S. etc. v. *McCay*, 28 F. 2d 777 (Point 10, p. 780).

Decision After Trial by Byers, District Judge.

It will be convenient to state the respective Findings, with appropriate comment.

FINDINGS

1. Defendant's contract with the Navy is dated December 12, 1958 for "Repair Seawall and Replace Fenders Pier 'G', complete and ready for use." "No. NBY-21183" Amount $158,768 Work to be started December 17, 1958, to (2033) be completed November 12, 1959. The following clause appears:

> "IV. The undersigned [the defendant] agrees to perform on site and with his [sic] own forces the following work; namely, concrete construction and timber work."

The foregoing is Plaintiff's Exhibit 1.

2. Defendant has been paid in full by the Government the entire said contract price, plus $37,025. for extras, making a total of $195,793.

The foregoing was reluctantly established at the trial and is not disputed.

3. The written contract between these parties was initiated by a written tender by plaintiff dated December 15, 1958 bearing the notation, signed by defendant's president, reading: "1/16/59 O.K. to proceed with ordering lumber hold fab [fabrication] for confirmation." Thus Plaintiff's Exhibit 2.

The contract itself is embodied in plaintiff's letter to defendant dated January 29, 1959, approved by defendant February 2, 1959:

Decision After Trial by Byers, District Judge.

(2034)

Letterhead of Browne & Bryan Lumber Company, Inc.
Grand Central Terminal, New York 17, N. Y.

January 29, 1959

"Mr. Ove Gustavsson
135 Lakeville Road
New Hyde Park, New York

Re: NavDocks Spec. No. 21183/58—Repair Sea Wall and Replace Fenders Pier 'G' New York Naval Shipyard, Brooklyn, N. Y.

Dear Sir:

We herewith confirm your order of January 16th and have proceeded with the following:

White Oak, Common Dimension (Freight Car Stock) in accordance with NHLA Rules:

Dressed Four Sides—Standard:

Posts—170 Required:

12 x 12 170/10′ (x/cut to 9′0″) (20400′ BM) @ $147.00 per M′BM

2″ Chamfer—2 corners one end.

1 Dado—1½″ x 14″.

2 Dadoes—1″ x 13¾″. @ $4.50 per stick

2 thru holes for 3½″ Galv. Pipe.

12 thru holes for 1″ Galv. Bolts with Counterbore 2″ deep x 3″ dia.

2—1″ thru holes to allow ¾″ bolt to go thru 3½″ pipe @ $ .20 per hole.

(2035) *Fenders—170 Required*:

12 x 14 170/16′ (38080′BM) @ $157.00 per M′BM

2″ Longitudinal Chamfer—2 edges.

3 Dadoes—1½″ x 11¾″.

6 Dadoes—1″ x 9¾″.

1 Bevel Cut—5″ x 5″.

1 Bevel Cut—6¾″ x 14″. @ $ 11.10 per stick.

6 thru holes for 1″ Galv. Bolts with Counterbore 2″ deep x 3″ dia. @ $ .20 per hole.

Wales—510 Required:

10 x 12 510/8′ (40600′BM) @ $147.00 per M′BM

4 thru holes for 1″ Galv. Bolts with Counterbore 2″ deep x 3″ dia.

6 thru holes for 1″ Galv. Bolts @ $ .20 per hole.

Chocks—510 Required:

10 x 10 7′6″ (x/ cut to 7′2½″) (31875′BM) @ $147.00 per M′BM

1½″ Longitudinal Chamfer—2 edges @ $ 1.10 per stick.

4 thru holes for 1″ Galv. Bolts with Counterbore 2″ deep x 3″ dia. @ $ .20 per hole.

"The above prices are as listed FOB truck job site or Cars, New York City Lighterage Limits, our option.

Decision After Trial by Byers, District Judge.

"We will notify you when we are ready for the Naval Inspector to take up this material, this inspection to be (2036) made at no charge to us.

"We will start delivery in five to six weeks and complete within 90 days, weather conditions permitting with a proposed delivery schedule of approximate one third of schedule per month.

"Terms are 2% 10 days, A. D. F., net 30 days.

"We have already supplied the Navy with the required number of copies of our order to our producer as per their request.

Please sign the original and return it for our files.

"We wish, very much, to thank you for this order and assure you that it will be given our most careful attention.

"Very truly yours,

BROWNE & BRYAN LUMBER CO., INC.

(Signed) WALTER H. ANDERSEN

Feb. 2, 1959

(Signed) OVE GUSTAVSSON
(As annotated)"

This is Plaintiff's Exhibit 5 and will be seen to call for the delivery of 1360 pieces of timber, to be bored with holes of different diameters, to receive bolts, at the stated contract price of 20 cents per hole.

(2037) 4. On April 28, 1959 defendant wrote to plaintiff re changes in size of certain of said holes:

"This is to confirm yesterdays telephone conversation as to changes in the fabrication of the timbers.

1. Change *all* counterbores in all timbers from a 3" diameter to a 3½" diameter.

2. Change size of hole into side of 12" x 12" Post from 3½" to 3⅝". * * *."

The foregoing is Plaintiff's Exhibit 7.

These required changes were at once communicated by plaintiff in writing to its fabricator of the timbers.

These several documents constitute the written contract between plaintiff and defendant. A subsequent order was given for extra lumber on September 16, 1959 and is covered by invoice of October 6, 1959.

These latter items do not enter into this controversy. It should be said that defendant now asserts that some or all of them were included in the payment by defendant to plaintiff of $2,000. on account, on December 11, 1959.

At that time defendant had not made any specific claim against plaintiff for reimbursement concerning the (2038) matters now embraced in the counterclaim in this litigation.

5. The defendant has paid $6,000. on account to the plaintiff as follows:

August	5, 1959	$2,000.
September	4, 1959	$2,000.
December	11, 1959	$2,000.

These payments were made in response to the frequent demands made by plaintiff which were not responded to, on the excuse that defendant was not receiving prompt payments from the Navy Department.

6. The written contract was modified by oral understanding between the parties reached on or about May 28, 1959 at the plant of National Wood Preservers Inc., Havertown, Pennsylvania, whereby defendant undertook

and agreed to bore holes in the timbers which by that time had not been already bored. This change was agreed to as the result of defendant's assertion that too much time was being taken by Wood Preservers and that Gustavsson could make much faster progress in that operation by using his pneumatic equipment, than by the electric power which was being used.

(2039) *Comment:*

There is no conflict in the testimony as to the fact that defendant would take over the boring of holes. The witnesses for plaintiff were Anderson, the plaintiff's salesman who negotiated the contract, and Jacoby, an officer of Wood Preservers. Gustavsson testified for defendant, but not to deny the essential fact in the foregoing finding.

7. There was no agreement that the cost of boring the holes by defendant would be at other than the contract price stated in Exhibit 5, nor was it made the subject of any written memorandum submitted by defendant to plaintiff at any time.

Comment:

It is true that Gustavsson testified that he stated to Anderson that the hole boring would be a matter of expense. He said further that as an accommodation, plaintiff would furnish certain wood borers and auger bits to defendant, and seemingly that was done. He also said that there was no discussion of the cost to defendant per hour of the drilling operation, but that "Anderson agreed to take care of it."

Anderson denies the latter statement; since this (2040) was an important element of the contract (for without

proper holes the timbers could not have been bolted into place to accomplish the fender-building job), it cannot be ignored as a mere casual incident to a discussion between the parties arising in the course of their relationship.

There were 10,880 holes to be drilled according to Exhibit 3, at an agreed cost of $2,176., of which 9,378 were taken over by defendant, with a credit to it of $1,875.

These figures make it obvious that if a change in the rate of charge involved was indeed an incident of the said modification of the contract, the defendant would have so notified the plaintiff in writing, stating the amount of the new figures or at least the need for a new computation. For failing so to do, it results that the defendant is restricted to the contract price of 20 cents per hole, for any and all hole drilling that it undertook, as the consequence of this verbal modification of the written contract. How many borings were so required is another question, which has not been demonstrated.

8. The plaintiff delivered to the defendant the timbers described in Plaintiff's Exhibit 3 according to the terms of the contract as modified according to Finding No. 7, (2041) with the exception of a few timbers that had to be replaced.

Comment:

This Finding is the crux of this case, and requires detailed exposition.

The defendant asserts a counterclaim made up of sundry elements, and they will be dealt with separately. The basic question is whether plaintiff made deliveries in accordance with its contract, and the affirmative finding in that respect is based upon these considerations:

(a) The precise respects in which the timbers were to be fabricated, i.e., the nature, characteristics and dimen-

sions of the various mechanical operations to be applied in order to render them adaptable for assembly and erection into fenders, were specified in shop drawings prepared by defendant and furnished by it to the plaintiff after approval by the Navy Department; thus Plaintiff's Exhibit 4.

Those drawings were sent to Wood Preservers which did the required work (except as to discontinuance of boring holes, as explained) on these 1,360 timbers as they were received by it from the lumber mill which was the source of supply.

The timbers were not shipped to defendant however (2042) until they had been inspected by the U. S. Navy inspector at the Wood Preserver plant. The witness Morris was the inspector and he testified that he made the required inspections at the plant by comparing the fabricated timbers with the plans and specifications (the shop drawings) and checking the material; that he certified approval by striking the end of each timber with a hammer, which caused a visible marking. Then he released the timbers for shipment. This was true except as to one "form #4" which was released without inspection. This testimony was not contradicted or questioned.

(b) The defendant argues that the timbers were not delivered in units; i.e., a complete set for each "bay." Seemingly the fenders were portions of a pier which was about 699 feet long on one side and 581 feet on the other, having an outboard width of 131 feet, composed of sections called bays. Three wales and chocks composed one bay; it may be assumed that there were also two posts to which the elements were fixed but that is not clearly stated in the evidence. It does appear, however, that Gustavsson asserts that delivery of the timbers should have been in units needed for each bay, and that because this was not done, his (2043) performance was delayed by the time required to assemble the timbers, bay by bay,

for convenient installation. It is not necessary to discuss this contention, because the contract contains no such provision, nor does any arise by necessary implication. If that had been a condition which had to be met by the plaintiff, the contract should have so specified. In the absence of such a provision, the plaintiff cannot be charged with alleged damages said to have resulted from its failure to do that which it had not undertaken, and the defendant's contentions in this respect cannot be and are not sanctioned.

(c) As to alleged delays in delivery: The contract reads in this respect:

> "We will start delivery in five to six weeks and complete wihin 90 days, weather conditions permitting, with a proposed delivery schedule of approximate one third of schedule per month."

It was stipulated that sixteen deliveries were made from April 28, 1959 to August 13, 1959, inclusive. The 90 days started to run on January 29, 1959 and expired April 29, 1959. This means that deliveries were not com- (2044) pleted within 90 days as undertaken, but that 100 additional days were required.

As to this, it is to be said that Jacoby (Wood Preservers) testified that there were some delays caused by weather conditions, rain and mud, such as were indicated in the expression as to weather conditions above quoted. There was no extra testimony on this subject. It is further a fact that some delay was occasioned by agreed changes in the size of the holes to be bored, while that was yet a part of plaintiff's undertaking. The time so involved cannot be clearly discerned from the testimony but it occurred during April, 1959.

Again, the defendant was not charged for any delay by the Government, but was paid its contract price in full.

Further, Gustavsson said he was making no claim for "stand-by" time, i.e, idle time caused by alleged failure to maintain the 90 day delivery clause, beyond May 22, 1959. Thus the time between April 29, 1959 and May 22, 1959 would encompass the delays in delivery.

For this interval of 23 days, the defendant argues that it has established its counterclaim to the extent of

(2045)

Wages paid.	$2,520.
Idle Crane	2,100.
Total	$4,620.

The testimony in support of this claim is found to be entirely unconvincing. The Government inspector Fritzson, made daily inspections of the defendant's work, and reports to his superiors to put them into a position to approve the contractor's bills for payment. He testified that from March 23, 1959 to and including May 21, 1959 he observed no stand-by time on the part of defendant, while his daily reports described the nature of the daily work in progress.

The synthetic nature of the testimony of defendant's witnesses Gustavsson and Saladino, plus the fact that the former either convinced himself to, or was persuaded that he should, testify as he did in support of the entire counterclaim, has been weighed against what the disinterested witness Fritzson said, with the result that his version is found to be the more convincing, as to both elements of this portion of the counterclaim, which is therefore disallowed.

In summary therefore as to delivery, the only default which can be charged against the plaintiff is in (2046) respect of 2,100 board feet of lumber purchased by defendant to replace certain timbers which were delivered

in a faulty condition, i.e., split or broken ends, at the proven cost of $388.50. The items so embraced are not clearly shown, but the result is deemed to have been established as stated, and so much of the counterclaim is approved.

9. The alleged corrective fabrication to the timbers delivered by plaintiff to defendant has not been shown to have been caused by plaintiff's failure to perform its contract.

COMMENT:

It is perhaps unnecessary to repeat that if the plaintiff performed its contract it is entitled to have judgment in this case. The testimony has been carefully weighed to ascertain whether defendant has sustained its burden of proof to establish that plaintiff did not so perform.

In that effort the Court has been confronted with the uncongenial task of examining into a day by day analysis of contentions that the timbers as delivered were not in conformity to the contract as to physical characteristics, of dimensions, conformation, size and position of (2047) holes, etc., with a view to reaching a conclusion on this subject.

The fact that the defendant did not reject any of the said timbers is admitted by Gustavsson, and attested to by Anderson, the plaintiff's salesman, and Burghardt, its Vice-President.

It is difficult to understand why there was no rejection or formal notice by defendant to plaintiff that it would be held financially accountable to defendant in connection with the considerable services it says it was required to render as compensation for that which it claims to have been required to do, in order to make these timbers conform to the shop drawings (Plaintiff's Exhibit 4).

No such written or formal notice was given prior to January 21, 1960, when defendant's Exhibit K was handed to Anderson. That was nine days after the Bonding Company acknowledged plaintiff's letter of January 5, 1960 by which the latter called attention to defendant's failure to pay the balance due under the contract.

The correspondence in that connection is found in Plaintiff's Exhibit 11 and 11A, the first being a letter addressed to the Bonding Company, dated January 5, 1960, and (2048) contains the following:

> "This is to advice you that we are one of the prime material suppliers for this project to Ove Gustavsson and that a substantial quantity of material is still unpaid for."

The second is the acknowledgment of January 12, 1960 and contains the following:

> "I have been informed that our principal is in no financial difficulty and that this indebtedness will be cleared up in due course."

The plaintiff had written to the defendant on September 10, 1959 [Exhibit 18] as follows:

> "We wish, at this time, to point out to you your long outstanding balance.
>
> "We note that a payment of $2,000.00 was made by you on September 4th, leaving an unpaid balance of $20,080.57.
>
> "A check from you, to substantially reduce this long overdue account, would be greatly appreciated."

The failure of Gustavsson to present to the plaintiff any demand for payment of a sum of money deemed by the defendant to be due as the result of the various mat-

ters (2049) now constituting the defendant's counterclaim, until after the correspondence with the Bonding Company, cannot be ignored in exploring the subject of the plaintiffs' performance of its written contract.

As has been written, there was no claim advanced by Gustavsson until January 21, 1960, at which time he handed to Anderson a pencil memorandum, six pages long, purporting to indicate work that the defendant had been required to perform in connection with the timbers delivered by the plaintiff. This is Defendant's Exhibit K, and purports to contain various sub-totals following the words "Total man hours" and certain items which need not be here repeated; among them is "Layout of holes, dadoes, chamfers, etc., $800." It is not possible to state a total in dollars of the amount seemingly asserted in this memorandum. The significant part of the picture is that this was the first occasion on which the plaintiff was confronted with anything like a demand for a sum of money allegedly owing by the plaintiff to the defendant.

If that memorandum had been handed by Gustavsson to the plaintiff prior to the writing by the latter of the letter above quoted to the Bonding Company, it would at least (2050) be consistent with his belief that he ought to confront the plaintiff with a demand for a sum of money based upon an asserted failure on the part of the plaintiff to perform its contract. Of course it would not follow that he was justified in making the claim, but at least such an action would have offered a striking contrast to the belated assertions in Exhibit K.

The failure on the part of Gustavsson to advance such a claim prior to the time that his interests were taken in charge by the attorney for the Bonding Company cannot be disregarded in weighing the testimony of Gustavsson and Saladino on the essential issue of plaintiff's performance of its contract.

Decision After Trial by Byers, District Judge.

In this connection, it has not been overlooked that Anderson testified that when he and Burghardt interviewed Gustavsson in connection with Exhibit K and in an effort to avoid litigation by making a reasonable settlement, the offer which they made was stated by Gustavsson to be acceptable to him but that he must first consult his attorney because he was not "a free man." That testimony was not denied and has necessarily entered into an appraisal of the good faith of the defendant's entire case.

(2051) Many of the various elements of the defendant's counterclaim as argued, long antedate the plaintiff's written demand contained in Exhibit 18, and it is difficult to reconcile those claims with the payments on account which have been above stated because it strains the Court's credulity to insist that beginning on March 23, 1959 and continuing through June 16, 1960, Gustavsson was secretly building up a claim for money damages totalling $21,918.56, without giving any notice whatever to the plaintiff that such a demand was in the process of accumulation.

The item of corrective fabrication totals $9,867.50 based upon what are said to be Gustavsson's records, but the entire item is lacking in specific data. In this connection, if any testimony had been offered that a given number of timbers delivered at or about a given time were deficient, and that notice thereof had been given to the plaintiff, it would be possible to accord to this branch of the testimony greater weight than this Court is able to bring to bear.

The item of $3,400. alleged to be for the use of the crane owned and operated by the defendant, cannot be given serious consideration for two reasons:

(2052) (a) It was part of the defendant's equipment which he was supposed to use in the performance of his contract with the Navy, and presumably entered into the

computation of the total charge that he submitted to the Government.

(b) There is no mention of any such item in Exhibit K, which clearly characterizes it as a remote afterthought, created elsewhere than in Gustavsson's office.

The same remark applies to the use of other items of equipment that Gustavsson must have expected to use when he entered into the contract with the Navy Department; also items for the use of compressed air.

With reference to the cost of layout [$800.], this item is not understood. Of course when Gustavsson purchased these timbers, he understood that he had to assemble them in order to perform his contract with the Navy.

Taken as a whole, the defendant's testimony is entirely unconvincing as to the plaintiff's failure to perform its contract. It may be that Gustavsson had more work to do for the Navy than he anticipated at the time that he entered into the main contract; it may be that there were changes directed by the Navy which entailed the rendition of services over and beyond the original contemplation of (2053) Gustavsson, but even if these assumptions are true, it does not follow that the plaintiff has not substantially performed the contract heretofore explained, except as to the item of $388.50 mentioned in the Comment under Finding Number 8.

Conclusion of Law

The defendant's counterclaim is disallowed and judgment is directed to be entered for the plaintiff in the amount of $19,459.75, with interest and costs.

If additional findings are desired, they may be settled on notice.

M. W. B.
U. S. D. J.

Decision of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 271—September Term, 1961.

(Argued March 28, 1962 Decided June 7, 1962.)

Docket No. 27348

THE UNITED STATES OF AMERICA for the Use and Benefit of BROWNE & BRYAN LUMBER CO., INC.,

Plaintiff-Appellee,

—against—

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

Defendant-Appellee,

—and—

OVE GUSTAVSSON CONTRACTING CO., INC.,

Intervenor-Appellant.

Before:

MEDINA, SMITH and HAYS,

Circuit Judges.

Appeals from a judgment and from an order of the United States District Court for the Eastern District of New York, Mortimer W. Byers, *Judge.*

Ove Gustavsson Contracting Co. Inc., intervenor and general contractor, in an action under the Miller Act, 40 . . .

U. S. C. Sections 270a, 270b, against the surety furnishing a performance and payment bond in connection with repair work for the Government, appeals from a judgment in favor of a materialman subcontractor who furnished lumber for the job, awarding damages for the amount agreed to be paid for the lumber, less a small allowance for replacement of damaged items, and dismissing the counterclaim of intervenor. The intervenor also appeals from an order striking the name of Massachusetts Bonding and Insurance Company from the notice of appeal as a co-appellant on the ground that the attorney who represented both the surety and the intervenor at the trial had no authority to appeal on behalf of the surety. Opinion below is reported at 195 F. Supp. 26. Affirmed.

WILLIAM V. HOMANS, New York, N. Y. (Philip G. FITZ, New York, N. Y., on the brief), *for plaintiff-appellee.*

MAX J. LE BOYER, Brooklyn, New York, *for defendant-appellee.*

ANTHONY B. CATALDO, New York, N. Y., *for intervenor-appellant.*

MEDINA, *Circuit Judge*:

There are two appeals before us. The first involves the merits in an action in effect for goods sold and delivered, with a counterclaim for damages for alleged delay, delivery of defective material and a congeries of miscellaneous subsidiary and related claims. The trial judge granted judgment for the amount agreed to be paid for the goods,

less an allowance of $388.50 expended in the replacement of a small amount of damaged lumber; and he dismissed the counterclaim in its entirety. The second appeal is from an order granting a motion by an alleged co-appellant to strike its name from the notice of appeal because it had not authorized the appeal to be taken. The opinion below is reported at 195 F. Supp. 26.

The proliferation of issues, the numerous briefs, appendices, letters and memoranda, and the fact that some eight motions have been made by appellant in this Court during the pendency of the appeals, make it desirable, we think, to state in simple, chronological sequence the development of the controversy and its progress after the commencement of the action. We shall insert a few parenthetical comments for the purpose of disclosing the sequence of events as an integral whole. The action is by a materialman under the Miller Act, 40 U. S. C. Sections 270a, 270b, against the surety for the principal contractor. The same attorney represented both the surety and the principal contractor throughout, and, some time after joinder of issue the principal contractor was permitted to intervene and assert its counterclaim or set-off against the subcontractor-plaintiff.

On December 12, 1958 appellant Ove Gustavsson Contracting Co. Inc. contracted with the United States to furnish all labor, equipment and materials for the repair of the seal wall and replacement of fenders on Pier G in the Brooklyn Navy Yard. A performance bond of $158,768 and a payment bond of $79,384 conditioned for the prompt payment of all persons supplying labor and materials in connection with the contract were required and were executed and delivered by Massachusetts Bonding and Insurance Company and accepted by the Government.

The contract with the subcontractor, as found by the trial judge, is an exhibit written on the letterhead of the

materialman-plaintiff, Browne & Bryan Lumber Co., Inc., under date of January 29, 1959 and signed by Gustavsson on February 2, 1959. The lumber to be delivered and the necessary details relative to sizes and fabrication are set forth, del very to start "in five or six weeks and complete within 90 days, weather conditions permitting with a proposed delivery schedule of approximate [sic] one third of schedule per month." Hereafter we shall refer to the parties as Gustavsson, the Lumber Company and the surety.

There was a subsequent order for additional lumber on September 16, 1959, covered by an invoice of October 6, 1959. The pertinence of this relates only to one of the many peripheral issues, as to whether a payment of $2,000 by Gustavsson to the Lumber Company on December 11, 1959 was of the amount or part of the amount due for the additional order or on account of the large balance due for deliveries of lumber pursuant to the terms of the contract of January 29, 1959.

The substance of the state of affairs before the commencement of the action by the Lumber Company against the surety was that the Lumber Company had a claim for $25,848.25 for goods sold and delivered, against which it had received only three payments of $2,000 each, on August 5, 1959, September 4, 1959, and December 11, 1959. The last delivery of lumber on the job was August 13, 1959; and it was conceded at the trial that the lumber was used on the job by Gustavsson. The Government paid Gustavsson the full amount specified in its contract, $158,768, plus $37,025 for extras, or a total of $195,793, without any penalty for delay. And yet the claim of the Lumber Company remained unpaid. Other materialmen were also clamoring for the money due them.

After getting little or no satisfaction out of Gustavsson, the Lumber Company wrote the surety on January 5, 1960 complaining of the delay, and the reply of the surety on

January 12, 1960 was to the effect that Gustavsson was "in no financial difficulty and that this indebtedness will be cleared up in due course." It was not cleared up, however, and the Lumber Company commenced this action on April 6, 1960.

Despite the fact that the Miller Act was designed to provide a prompt means of satisfying the claims of those furnishing labor and materials for use on construction or repair work for the Government, this litigation is still in progress and the record before us discloses a pattern of dilatory tactics, including the series of delaying moves in this Court, that is much to the discredit of the administration of justice. Moreover, in retrospect it is difficult to see how much of this could have been avoided, as it was not until the lapse of twelve full days of trial before an exceptionally patient and considerate judge that the testimony of both Ove Gustavsson, President of Gustavsson, and its other principal witness was found to be false, and Gustavsson's documentary evidence branded as dubious and unreliable.

The answer of the surety was not filed until August 30, 1960. The attorney was the same attorney who later represented Gustavsson on the motion to intervene, and who acted as counsel at the trial for both the surety and Gustavsson. No jury trial was demanded at the time of filing the answer of the surety. In this answer it was alleged as a defense that the lumber was not delivered in time, that when it was delivered it was damaged and in a raw and unfabricated condition and that Gustavsson had rejected it. It was also alleged by way of defense that the District Court had no jurisdiction of the case, that the Lumber Company had no capacity to sue and that Gustavsson was an indispensable party.

As early as September 6, 1960, as disclosed by the papers on file in the case, Ove Gustavsson, President of Gustavsson, signed and swore to the affidavit annexed to the notice

of motion later made for an order permitting Gustavsson to intervene. This notice of motion was originally dated September 6, 1960 but was partially erased and November 26, 1960 substituted. The reason for waiting to serve the motion papers on the motion to intervene is all too plain. The attorney thought he had an ace in the hole, a possible means of obtaining substantial further delay, in the form of a demand for a jury trial, to be stated in the "Intervenor's Plea," the pleading attached to the notice of motion and proposed to be served if Gustavsson's motion for leave to intervene should be granted; and it was thought expedient to delay the making of the motion until other dilatory maneuvers had failed.

The Lumber Company noticed the case for trial and filed a statement of readiness. The attorney for the surety filed an affidavit of non-readiness in which no mention is made of any forthcoming motion to intervene or of any demand for a jury trial. Judge Rayfiel held a hearing on November 22, 1960 and declared the case ready.

The motion to intervene, while returnable on December 7, 1960, was not argued before Judge Mishler until December 21, 1960. In the meantime, the customary pre-trial conference was held before Judge Bartels on December 16, 1960, and the case was set down on the non-jury calendar for the week of January 19, 1961, "the case to be tried when reached." True it is that Judge Bartels was informed that Gustavsson "is moving to intervene," but nothing was said of the fact that the motion papers had been prepared long prior to the time Judge Rayfiel marked the case ready for trial, but had been held in reserve.

January 5, 1961, Judge Mishler granted the motion to intervene on condition that Gustavsson waive a jury trial and be ready for trial when the case appeared on the calendar for trial. The waiver was filed, but imposition of this condition is one of Gustavsson's points on the appeal from the judgment.

The "Intervenor's Plea" amplifies what was alleged in the answer prepared by the same attorney and filed on behalf of the surety. Instead of alleging that the lumber was rejected, however, Gustavsson asserts that in order to induce Gustavsson to accept damaged, defective and unfabricated lumber the Lumber Company agreed to pay Gustavsson the fair and reasonable cost of dressing and fabricating the lumber, to "furnish whole lumber in exchange for and in place of the lumber received in damaged condition," and to pay damages for delays in delivery. Without attempting further to amplify the details, the "Intervenor's Plea" concludes with a demand for judgment against the Lumber Company in the sum of $23,500.

After a careful scrutiny of the testimony and the large number of exhibits Judge Byers decided that he did not believe the witnesses who testified on behalf of Gustavsson. He found this testimony "unconvincing." He described the testimony of the principal witness as "synthetic." The most charitable view of what Judge Byers thought of the Saladino Log and Exhibit K, strongly relied upon by Gustavsson on this appeal, is that they were wholly unreliable supports for Gustavsson's fantastic claims.

As Judge Byers credited the testimony of the witnesses for the Lumber Company and did not believe the testimony of Gustavsson's witnesses, we are at a loss to discover any basis for a reversal of the judgment on the merits. True it is that Gustavsson himself and Saladino, his engineer, were ready at all times to say they saw this and saw that, or had conversations with various persons, and much of this is not contradicted in the sense that witnesses were called to controvert every detail of what these witnesses testified to. The fact remains that Judge Byers rejected their testimony on the ground that he did not believe it and no phase of the testimony thus rejected can be considered by us as a basis for setting aside a finding as clearly

erroneous. Moreover, contrary to the assertion of counsel, it is the law that testimony deemed not credible may be disregarded by the trier of the facts, even though such testimony has not been stricken from the record.

In view of the general atmosphere of confusion that seems to have settled upon the case, as revealed in the numerous briefs, letters and memoranda filed with us prior and subsequent to the oral argument, and the persistence with which counsel for Gustavsson has made various and sundry representations and claims to the effect that the rejection of Gustavsson's counterclaim is unjust and not to be sustained on the law or the facts, we have been at particular pains to study the whole transcript of the trial and the exhibits, as well as the briefs, letters and memoranda. The result is that we are convinced by the record as a whole that there is no basis upon which we could set aside any of the findings as clearly erroneous. Indeed, we do not see how the trial judge could very well have arrived at a different conclusion.

It would be a tedious and unprofitable task to attempt to discuss the pros and cons of the large number of miscellaneous issues of fact. We shall, however, make brief reference to a few of the basic ones.

There was some delay in the delivery of the lumber. Some of this was due to weather conditions, as testified by the witness Jacoby; and some was due to agreed changes in the size of the holes to be bored. No credible evidence was submitted by Gustavsson to establish the amount of delay attributable to the Lumber Company or to establish any damages arising out of such delay.

One of the principal issues of fact related to an oral agreement made on May 28, 1959, relative to the boring of the holes in the lumber. It was Gustavsson's claim that he was to take over the boring of the holes and that the Lumber Company agreed to pay the reasonable cost of

doing the boring. The Lumber Company's witness Anderson, on the other hand, testified that Gustavsson was to take over the boring of the holes and that the Lumber Company would not charge for the drilling of the holes. As Jacoby, who was also present at the conversation, put it, the "charge was being eliminated from the contract." This meant a credit to Gustavsson of $1875, at the contract rate of 20 cents per hole, which the Lumber Company allowed in calculating the sum for which suit was brought. As the trial judge rejected Gustavsson's testimony, there resulted Finding 7 to the effect that the agreement claimed by Gustavsson was not made and the modification did no more than eliminate, from and after May 28, 1959, the 20 cent per hole charge to be made according to the original arrangement.

Gustavsson also claimed that the lumber was not delivered in units, so that each unit could be conveniently assembled for each of the numerous "bays" on the pier. The answer to this was that the contract made no provision for deliveries in units, nor were the circumstances such as to give rise to any such agreement by implication.

The crux of the case is Finding 8, as follows:

> "The plaintiff delivered to the defendant the timbers described in Plaintiff's Exhibit 3 according to the terms of the contract as modified according to Finding No. 7, with the exception of a few timbers that had to be replaced."[1]

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[1] Prior to the execution of the contract of January 29, 1959, referred to in an earlier portion of this opinion, there was a letter (Exhibit 2) from the Lumber Company to Gustavsson of December 15, 1958, making certain quotations. On this letter Gustavsson had written "OK to proceed with ordering lumber hold fab. for confirmation." Exhibit 3 is another letter from the Lumber Company to Gustavsson of January 16, 1959 enumerating the items of lumber. The necessary details for fabrication appear in the contract of January 29, 1959 (Exhibit 5).

What Gustavvson's inflated and unsubstantiated counterclaim of $23,500 boiled down to was about 2100 feet of damaged lumber that were replaced by Gustavsson at a cost of $388.50, and this amount was deducted by the trial judge from the judgment awarded against the surety. On this state of the record we think the trial judge quite properly applied the doctrine of substantial performance. See *United States ex rel. Johnson* v. *Morley Const. Co.*, 2 Cir., 1938, 98 F. 2d 781, cert. denied, 305 U. S. 651; *Inhabitants of City of Plainfield* v. *Palmer*, 3 Cir., 1934, 72 F. 2d 312; *American Steel & Iron Co.* v. *L. B. Foster Co.*, Sup. Ct., 1932, 148 Misc. 727, 266 N. Y. S. 800, aff'd, 1933, 238 App. Div. 882, 262 N. Y. S. 1008, aff'd, 262 N. Y. 623, 188 N. E. 92; compare N. Y. Personal Property Law, Section 150.

Continuing our chronological summary we come to a bitter controversy that arose between Gustavsson, or its attorney, and the surety after the entry of judgment. On the basis of what the attorney for Gustavsson or Gustavsson's president had represented the facts to be the surety authorized Gustavsson's attorney to defend the action on its behalf and he did so. It was this same attorney, as we have already said, who filed the motion of Gustavsson to intervene and who actively represented both the surety and Gustavsson at the trial. When it turned out at the trial that Gustavsson's representations were not substantiated and that there appeared to be little likelihood that this Court would reverse an experienced and able trial judge on the ground that his findings of fact based upon the credibility of witnesses were clearly erroneous, there very naturally arose the question of whether the surety would authorize an appeal and perhaps throw good money after bad.

The attorney urged the surety to authorize him to appeal to this Court on behalf of the surety. The reply was that

the surety would not do this unless furnished with full cash collateral. No such collateral was forthcoming. But the attorney appealed just the same, and he did so on behalf of both Gustavsson and the surety. The surety promptly moved to delete its name from the notice of appeal. The motion was vigorously opposed, on the ground, among others, that the District Court had no jurisdiction to decide the matter. The motion was thereupon referred to Judge Byers, who took the matter under advisement and filed an interim memorandum suggesting clarification of the attorney's position. The only clarification that was forthcoming was an affidavit on behalf of the surety reiterating its position that it had not authorized the appeal on its behalf, together with a stipulation substituting Max J. Le Boyer for Arthur H. Hayman, the former general counsel for the surety, who had died, and reference was made to the following clause of the indemnity agreement between Gustavsson and the surety:

> "The Company shall have the exclusive right to decide and determine whether any claim, demand, liability, suit, action, order, judgment or adjudication, made or brought against the Company on the bond or bonds herein applied for, shall or shall not be defended, tried or appealed, and its decision shall be final, conclusive and binding upon the undersigned, and any order, judgment or adjudication made, entered or affirmed as a result thereof, or any loss, cost, charge, expense or liability thereby incurred, sustained or paid, shall be borne by the undersigned and the undersigned expressly thereto consents."

Thereupon Judge Byers granted the motion and Gustavsson appealed.

Except for the point relative to the jurisdiction of the District Court, to which we shall return, the arguments

of counsel for Gustavsson read like Alice in Wonderland. He insists that the interim memorandum constituted a denial of the motion by Judge Byers, that the decision made later was an unauthorized and improper reversal of the allegedly prior decision, that all this was done without notice to Gustavsson and amounts to a deprivation of constitutional rights, as a denial of due process of law.

The plain fact is that authority to take the appeal on behalf of the surety was refused. It was refused in the exercise of a right reserved to the surety in its contract of indemnity for its protection in just such a situation as the one in which it found itself after the filing of the opinion and findings of Judge Byers after the trial. There was but one decision of the motion to strike and there was more than ample notice and opportunity for Gustavsson to submit any affidavits or other proof that might have been available in opposition to the motion.

On the jurisdiction question it is generally true that the service of a notice of appeal takes a matter out of the control of the District Court. But here the motion to strike was made promptly and the appeal was not docketed until January 16, 1962. The order granting the motion to strike was settled on notice and was filed on November 13, 1961. The last sentence of Federal Rules of Civil Procedure, Rule 73(a) seems clearly applicable. It reads:

> "If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant."

This is a case where a purported appellant moves to dismiss and we think the District Court had jurisdiction to decide the motion.

In any event, it is clear to us that this Court has power to act and we here and now, on the basis of the evidence before us, strike out the name of Massachusetts Bonding and Insurance Company from the notice of appeal.

We think it of no significance in connection with either of the two appeals before us that Hanover Insurance Company, with which the Massachusetts Bonding and Insurance Company has merged, has paid $20,000 and taken an assignment of the judgment from the Lumber Company.

We have given the most careful consideration to the point about the demand for the jury trial. It is important that this fundamental right be preserved intact and not eroded by unsympathetic interpretation or the imposition of conditions designed to clear up the calendars of the courts. We sustain the action of Judge Mishler in granting the motion to intervene on condition that there be filed a waiver of jury trial, and we do so only because of the peculiar circumstances of this particular case and because we believe the dilatory tactics here practiced and other maneuvers that we find it not necessary to describe in detail are not to be condoned.

Both the judgment and the order appealed from are affirmed.

Decision of Court of Appeals on Petition for Rehearing.

[SAME TITLE]

Before MEDINA, SMITH and HAYS, Circuit Judges.
On Petition for Rehearing.

Anthony B. Cataldo, New York, N. Y.,
for intervenor-appellant.

Petition denied.

/s/ HAROLD R. MEDINA
/s/ J. JOSEPH SMITH
U. S. C. JJ.

July 3rd, 1962

Statute Granting Jurisdiction

Title 28 U.S.C.A. Section 1254.

Section 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

• • •

Article VI, Clause 2 of the United States Constitution.

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article VI, Clause 3.

United States Constitution.

Clause 3. The Senators and Represenstatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Amendment 7.

United States Constitution.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 38(a) and (b) of the Rules of Federal Civil Procedure.

Rule 38. Jury Trial of Right.

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

* * *

Rule 39 (a) of the Rules of Federal Civil Procedure.

Rule 39. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or Statutes of the United States.

Rule 24(a) of the Rules of Federal Civil Procedure.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;

* * *

The Miller Act.

40 U.S.C.A. Section 270a.

270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided

for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 percentum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

The Miller Act.

40 U.S.C.A. Section 270b.

270b. Same; rights of persons furnishing labor or material (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety

days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshall of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 472

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO., INC.,
Plaintiff-Respondent,

AGAINST

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Defendant-Respondent,

AND

OVE GUSTAVSSON CONTRACTING CO., INC.,
Petitioner and Intervenor-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT IN OPPOSITION

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IN THE

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No. 472

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO., INC.,
Plaintiff-Respondent,

AGAINST

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Defendant-Respondent,

AND

OVE GUSTAVSSON CONTRACTING CO., INC.,
Petitioner and Intervenor-Appellant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PLAINTIFF-RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court (p. 11a, Appendix of Petition) granting judgment after trial for plaintiff is reported at 195 F. Supp. 26. The unanimous opinion of the

Court of Appeals for the Second Circuit, affirming the judgment of the District Court (p. 30s, Appendix of Petition) is reported at 303 F. 2d 823. Petition for rehearing was denied on July 3, 1962.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented by Petitioner

We are unable to accept the questions formulated by petitioner as correctly representing the issues of this case.

Petitioner's question "1" contains, contrary to the facts, as a key assumption, that a jury trial was taken from it by judicial direction.[1, 2] Petitioner's question does not state, understandably, whether petitioner entered the case by way of subdivision (a) of Rule 24 of the Federal Rules of Civil Procedure dealing with **"Intervention of Right"** or subdivision (b) of said rule dealing with **"Permissive Intervention"** (1a).

---

[1] References followed by "s" are to appendix to petition. References followed by "a" are to appendix hereto.

[2] The order of Judge Mishler, made upon petitioner's motion to intervene, more than 8 months after the commencement of the action, did not deny petitioner a jury trial but only required petitioner to waive a jury trial if it elected to *intervene* in this action at such late date. The issues raised by the intervention could have been raised in any other independent action brought by petitioner *"without unduly delaying or prejudicing the adjudication of the rights of plaintiff"* (the test set out by Rule 24(b) for permissive intervention (1a).)

Similarly, petitioner's question "2" makes the basic and incorrect assumption, contrary to express findings,[3] [4] that the courts below "disregarded the evidence of both sides * * * " and that "there was a disregard of uncontradicted evidence proving use-plaintiff's failure to perform according to the contract terms".

---

[3] The opinion of Judge Byers is respectfully referred to, where at 23s, rather than disregarding the evidence he considered it and made findings contrary to petitioner's contentions, and at 24s where he found petitioner's testimony with respect to some phases of its counterclaim "entirely unconvincing" and characterized the testimony of petitioner's chief witnesses as "synthetic" and at 28s where petitioners' testimony "strains the Court's credulity" and at 29s where he characterized evidence offered by petitioner as a "remote afterthought, created elsewhere than in Gustavsson's office" and evaluated the evidence offered by petitioner with the observation: "Taken as a whole, the defendant's testimony is entirely unconvincing as to the plaintiff's failure to perform its contract."

[4] The opinion of the Court of Appeals is likewise respectfully referred to where at 36s it observed: "* * * With respect to petitioner's evidence, the most charitable view of what Judge Byers thought of the Saladino Log and Exhibit K, strongly relied on by Gustavsson on this appeal, is that they were wholly unreliable supports for Gustavsson's fantastic claims" and at 37s where the Court of Appeals unanimously stated: "In view of the general atmosphere of confusion that seems to have settled on this case, as revealed in the numerous briefs, letters and memoranda filed with us prior and subsequent to the oral argument, and the persistence with which counsel for Gustavsson has made various and sundry representations and claims to the effect that the rejection of Gustavsson's counterclaim is unjust and not to be sustained on the law or the facts, we have been at particular pains to study the whole transcript of the trial and the exhibits, as well as the briefs, letters and memoranda. The result is that we are convinced by the record as a whole that there is no basis upon which we could set aside any of the findings as clearly erroneous. Indeed we do not see how the trial judge could very well have arrived at a different conclusion." * * * and "No credible evidence was submitted by Gustavsson to establish the amount of delay attributable to the Lumber Company or to establish any damages arising out of such delay."

The questions presented are:

1. Where the granting of petitioner's motion in the District Court for leave to intervene was discretionary under the circumstances existing, was the requirement that a jury trial be waived a proper condition for permitting intervention, and in any case, having availed itself of the privilege of intervention and having waived a jury trial may the petitioner (intervenor) now recant such waiver and challenge the order granting leave to intervene?

2. Is the trier of the facts bound as a matter of law to accept testimony, whether it be controverted or not, that does not satisfy his mind, that he finds to be "synthetic" and "unconvincing" or shall due regard be given to the opportunity of the trial judge to judge of the credibility of the witnesses as is provided by Rule 52(a) of the Federal Rules of Civil Procedure (5a)?

3. Where the reviewing court upon a review of the record, including the entire transcript of the trial and the exhibits, etc. with the result that it found intervenor's counterclaim "inflated" and "unsubstantiated" (39s) and stated that it was "convinced by the record as a whole that there was no basis upon which we could set aside any of the findings as clearly erroneous. Indeed we do not see how the trial judge could very well have arrived at a different conclusion" (37s), will this Court accord the petitioner still another opportunity to present its "synthetic" and "unsubstantiated" claims for further evaluation?

Statutes and Rules Involved

Rule 24(a)(b)(c) of the Federal Rules of Civil Procedure. (1a).

Rule 38 of the Federal Rules of Civil Procedure (3a).

Rule 39 of the Federal Rules of Civil Procedure (4a).

Rule 52 of the Federal Rules of Civil Procedure (5a).

The Miller Act, 40 U. S. C. A., Sections 270a and 270b (46s-48s).

Statement of the Case [5]

Plaintiff, a lumber dealer, sued defendant bonding company, as surety, upon a payment bond posted under the Miller Act, 40 U. S. C. A. 270a and 270b (46s-48s), for the balance due in the sum of $19,848.25 upon the agreed price of certain lumber sold and delivered between April and August 1959, to petitioner Gustavsson, a principal contractor with the government.[6] Said lumber was actually used on the job for which it was purchased, the repair of a sea wall at the Brooklyn Navy Yard.[7] It is undisputed that the petitioner received its full contract price of $158,768, plus $37,025 in extras, totalling $195,793 from the government, without penalty for delay,[8] and that petitioner failed to pay plaintiff and other suppliers for the materials furnished by them and used on the job.[9]

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[5] Respondent will be referred to as "plaintiff", petitioner as "petitioner" or "intervenor" and the bonding company as "defendant" or "bonding company" or "surety".

[6] Page 4 of certified record.

[7] Page 13 of certified record.

[8] Pages 1239-1241 of certified record.

[9] Page 1289 of certified record.

The agreed price of the lumber sold and delivered by plaintiff was in the amount of $25,848.25. Intervenor paid plaintiff $6,000 on account, $2,000 of which was paid after nearly all the lumber had been delivered and $4,000 of which was paid in two equal payments long after all of the lumber had been delivered. These payments were made in response to frequent demands made by plaintiff, which were not responded to on the excuse that intervenor was not receiving prompt payments from the Navy Department (19s). Plaintiff's profit, if the whole bill were paid, would have been about $1,500.[10]

Payment of the balance due not being forthcoming from the contractor-intervenor, plaintiff addressed a letter to defendant bonding company on January 5, 1960 advising that a substantial quantity of the material sold to the intervenor was still unpaid for. The defendant bonding company answered such letter on January 12, 1960 in its relevant part as follows:

> "I have been informed that our principal is in no financial difficulty and that this indebtedness will be cleared up in due course" (26s).

Payment not being thereafter forthcoming plaintiff commenced this action against the defendant on the Miller Act bond on April 6, 1960. After many generously spaced extensions of time to answer granted to Anthony B. Cataldo, Esq., petitioner-intervenor's personal counsel, who was acting for the defendant surety, he interposed a catchall answer on defendant's behalf on August 30, 1960 containing a general denial and five separate defenses including a defense alleging that plaintiff defaulted on and breached its contract to deliver lumber to petitioner by late deliveries and by delivering damaged, un-

[10] Page 1545 of certified record.

fabricated and raw lumber. No jury trial was demanded by Mr. Cataldo on behalf of defendant (p. 1670 of certified record).

Thereafter pre-trial depositions were completed by the parties, Mr. Cataldo representing the defendant, and plaintiff filed its note of issue and statement of readiness on November 15, 1960.

The District Court thereafter called the case for pre-trial. Upon pre-trial before Judge Bartels an order was made placing the case on the "trial calendar for the week of January 19, 1961, the case to be tried when reached" (p. 1698 of certified record).

Thereafter an order was made by Judge Mishler upon the application of petitioner as a proposed intervenor, 8 months after the commencement of the action, for leave to intervene "in accordance with Rule 24 of the Rules of Federal Civil Procedure" and assert a plea or counterclaim. The proposed intervenor's plea attached to its motion papers for leave to intervene recited a demand for jury trial.

Since it was pointed out to Judge Mishler, before whom the motion for leave to intervene was heard, that the case had already reached such posture that a trial on the non-jury calendar was imminent and that the adjudication of the rights of plaintiff, as one of the original parties contemplated by Rule 24(b) of the Federal Rules of Civil Procedure (1a) would be prejudiced by removing the case from its position on the ready calendar for trial without jury, he granted the motion for leave to intervene upon condition that the proposed intervenor waive a jury trial (9s). The intervenor, by written waiver waived trial by jury (10s) and served and filed its counterclaim by Anthony B. Cataldo, Esq. The defendant, also by An-

thony B. Cataldo, Esq, then served, by leave of court, an amended answer likewise containing no demand for jury (p. 1744 of certified record).

Intervenor took no appeal from the order granting intervention. It participated in further pre-trial discovery relative to its counterclaim [11] and announced itself ready when the case was assigned for trial and participated in the trial [12] and asserted and offered proof of its counterclaims. It was represented throughout by Mr. Cataldo who as well represented defendant.

After twelve non-consecutive days of trial, Judge Byers, the trial judge, rendered a carefully analyzed, detailed and exhaustive decision (11s) 195 F. Supp. 26, directing the dismissal of petitioner's counterclaim (except for a set-off of $388.50) with judgment to be entered for the plaintiff against the defendant in the amount of $19,459.75 together with interest and costs to be taxed.

Thereafter intervenor appealed such decision and the Court of Appeals for the Second Circuit affirmed (30s) 303 F. 2d 823.

Reasons for Not Granting the Writ

First. Petitioner has failed to show the existence of special and important reasons for the review by this Court of the judgment here involved;

Second. Entirely apart from the invalidity of petitioner's contentions, this case is clearly not appropriate for certiorari. The questions presented are on alleged

[11] Page 1802 of certified record.

[12] Page 2 of certified record.

errors of law of private concern only to the litigants involved and the judgment against the intervenor is only of economic concern to itself;

THIRD. Although petitioner claims inconsistently that the decision of the "Court of Appeals * * * decides an important Federal law in a way in conflict with the applicable decisions of this Court or which perhaps, has not been precisely before this court and should be settled by this court" there is in fact not shown to be any departure from any applicable decision of this court or any conflict of decision. It appears that petitioner is aggrieved by the refusal of the lower courts to adopt petitioner's interpretation of the law or to credit its exaggerated and fanciful claims and petitioner seeks certiorari in order to obtain another hearing;

FINALLY. The decisions of the District Court and the Court of Appeals are in full accord with applicable law and the evidence and are correct.

Argument in Support of Reasons for Not Granting Writ

1. Petitioner never had a right to a trial by jury, moreover it effectively waived a jury trial.

a. Petitioner grounds its argument on the Seventh Amendment of the United States Constitution (44s), claiming it had an absolute right to a trial by jury in this action to recover a sum of money in excess of twenty dollars and that the condition imposed for its intervention in this lawsuit was unwarranted. Petitioner bases its claim to *intervention of right* by virtue of Rule 24(a) of the Federal Rules of Civil Procedure (46s). In this, petitioner imposes on this court and misrepresents the facts.

The time elapsed between the commencement of this action on April 6, 1960 and the joining of issue on August 30, 1960 were not spent in negotiating a settlement as petitioner states, rather they were consumed in stalling plaintiff and in avoiding payment of its bill by conducting tongue-in-cheek negotiations and concocting fanciful counterclaims asserted as defenses in defendant's answer and then later asserted as counterclaims upon petitioner's motion for leave to intervene returnable November 25, 1960, three months later than the filing of defendant's answer.

Since it was petitioner's personal counsel, Anthony B. Cataldo, Esq., who, upon his request to the defendant surety company was retained to interpose an answer on the surety company's behalf,[13] it appears that having pleaded the same subject matter as defenses, the intervention might have been sought earlier. The delay therefore in seeking intervention seems intentionally used as a further dilatory tactic as the Court of Appeals observed (35s):

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[13] At page 1657 of the certified record we find the colloquy:

"Mr. Cataldo: I represent Gustavsson. I do not represent the Bonding company, I represent Gustavsson——

The Court: Why do you suppose Gustavsson retained you?

Mr. Cataldo: Why?

The Court: Yes.

Mr. Cataldo: Because he retained me. He didn't—the company did not retain me. The company—I asked the company to retain me so I could save the expense to Gustavsson.

The Court: That is what I thought.

Mr. Cataldo: So I could save the expense to Gustavsson, but I want to tell your Honor, I haven't received a fee from Mr. Gustavsson for the last eighteen months. The man hasn't had any money. He has had difficulty trying to pay all these bills.

Mr. Homans: What did he do with the $100,000 profit?

The Court: He got all his money from the Government.

Mr. Cataldo: I beg your pardon, sir?"

Petitioner here states that its motion to intervene was pursuant to Rule 24(a) of the Federal Rules of Civil Procedure which deals with *Intervention of Right*. Petitioner fails to state that its notice of motion to intervene recited that it was made in scattershot "as provided by Rule 24 of the Rules of Federal Civil Procedure" [14] without specification of whether subdivision (a) or (b) of said rule was invoked and that Ove Gustavsson's affidavit on the motion stated, *inter alia*, "in accordance with Rule 24 a and b, intervenor should be permitted to intervene in this action * * *" [15]

While petitioner's motion for intervention when made recited the authority therefor as both the mutually exclusive subdivisions (a) and (b) of Rule 24 of the Federal Rules of Civil Procedure an analysis of the situation as it existed at the time indicates clearly that the only avenue to intervention open to intervenor was the permissive provisions of subdivision (b) (1a).

Petitioner as an applicant intervenor did not fit within the narrow confines of subdivision (a) **Intervention of Right**. (1) No statute conferred an unconditional right to intervene; the representation of the applicant's interest was not inadequate since it was by its own personal counsel; there was no property in the custody or control of the court or an officer to be distributed.

We are not faced here with a case where by some contract or agreement, representation is foisted or forced upon a proposed intervenor by a strange or unsympathetic counsel, whose interest, or the interest of his actual client, might not coincide with intervenor's. Here, the representation of the defendant bonding company was actually in the

[14] Page 1080 of certified record.

[15] Page 1088 of certified record.

interest of intervenor. Any benefit gained by the defense would ultimately benefit intervenor by a reduction of its ultimate liability as principal to its surety. Further, the elements of intervenor's counterclaims were identical with the defenses of the defendant interposed without demand for jury by Mr. Cataldo. The litigation of those defenses claimed by defendant surety as set-offs against plaintiff's claim involved the same issues presented by Mr. Cataldo upon the intervention. Can it then be said that the representation of applicant's interest by existing parties was inadequate? What more adequate representation could intervenor have desired than that of its own attorney upon the very issues raised by its plea?

The intervenor therefore came to the District Court as an applicant for **Permissive Intervention** under subdivision (b) of Rule 24. Such being the nature of the application, the District Court was clothed with discretion and mandated to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties", (last sentence of Rule 24(b) (1a)). Judge Mishler correctly exercised that discretion upon being shown that a jury trial would create delay and result in prejudice to plaintiff since the case would have lost its already pretried status and would have had to be removed from the ready non-jury docket for trial.

Judge Mishler's decision was in line with the proper considerations for the relief requested as expressed in *Kass* v. *Baskin*, 164 F. (2d) 513, where the Court of Appeals for the District of Columbia stated at page 515:

> "The second question in the case concerns the considerations which should control the court in the exercise of its power to grant a jury trial after the parties had foregone their rights to demand one. One view is that unless the court finds that a jury

> trial would prejudice the plaintiff, it must grant the defendant's demand or motion for such trial. The other view is that the court may consider and act upon any and all pertinent factors in the case, including particularly the nature of the issues presented by the pleadings and the general orderly disposition of the court's business. We think that the latter is the correct rule. * * * "

and at page 516, the court continued:

> "A few minute's delay, during which no substantial action is taken by the court or the opposing litigant, is one thing; a delay of more than a month, during which the case is set for trial on the non jury docket and the opposing litigant presumably prepares his case on that basis is a very different thing."

No abuse of discretion is shown in Judge Mishler's imposition of the waiver of jury trial for this permissive intervention under the circumstances of there having been already had discovery, pre-trial and ready calendar status for trial for the week of January 19, 1961 (pre-trial order, p. 1698 of certified record) since timeliness is a matter within the sound discretion of the trial court. Moore's Manual, 14.05[4], p. 954; *Simms* v. *Andrews*, C. C. A. 10, 118 F. 2d 803.

b. Petitioner has effectively waived a trial by jury. Petitioner contends that a jury trial was taken away from him, that it was not waived despite the express written waiver (10s) made following Judge Mishler's grant of intervention (9s).

No appeal was taken from Judge Mishler's order, although it was appealable; if as petitioner now claims, its

intervention was a matter of right. 28 U. S. C. A., §1291; *Thompson* v. *Broadfoot*, C. C. A. N. Y., 1948, 165 F. 2d 744; *Cameron* v. *Harvard*, C. C. A. R. I. 1946, 157 F. 2d 993; *Alston* v. *Federal Power Commission*, C. C. A. 10, 1943, 137 F. 2d 55; *U. S.* v. *Phillips*, 1901, 107 F. 824; *Hirschorn* v. *Mine Safety Appliances*, C. C. A. 3, 193 F. 2d 489.

Intervenor entered the case, served its plea or counterclaim without further demand for jury, participated in discovery proceedings, and fully participated in the trial asserting its counterclaims.

If petitioner as an intervenor had any right to a jury trial it was effectively waived. *Kearney* v. *Case*, 79 U. S., 12 Wall. 275; *Perego* v. *Dodge*, 163 U. S. 160, 166.

The only jury demand ever made in this case was upon a *proposed* pleading accompanying petitioner's motion as an *applicant* for permissive intervention seeking party status. Rule 38(a) and (b) of the Federal Rules of Civil Procedure which deals with **Jury Trial of Right** (3a) did not yet apply to petitioner since it was not yet a *party*. Nor does Rule 24 (a) or (b) (1a) dealing with intervention so designate a proposed intervenor as a *party*. An order was required to accomplish such status. Moore's Manual, §14.05[4], p. 952; *Cowan* v. *Tipton*, D. C. E. D., Tenn., 1 F. R. D. 694. Nor was the proposed intervenor's plea yet a pleading within the contemplation of Rules 38 and 39 of the Federal Rules of Civil Procedure (3a, 4a).

After the intervention was granted on January 16, 1961 the pleading served by intervenor contained no demand for jury.[16]

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[16] Page 1731 of certified record.

2. In any event, intervenor, having accepted the benefit of intervention granted by Judge Mishler's order, cannot now be heard to appeal from it.

Despite the safeguards in the Constitution and the Rules of Civil Procedure preserving the right of jury trials, the right to a jury trial, if it exists in any case, is personal to a litigant, who may waive it by his action or nonaction. Federal Rules of Civil Procedure, Rule 38(d)(a), Rule 39(a) (3a).

Intervenor effectively waived a jury trial by its express waiver dated January 17, 1960 (10s) and again after it attained party status, by failure to demand a jury with its plea,[16] and again when it proceeded to a trial without a demand for jury. Judge Mishler did not deny intervenor a day in court for it to be claimed by petitioner at page 15 of its petition that a jury trial was taken away from him by an involuntary waiver forced upon him by judicial decree. Nobody stayed intervenor from any appeal to which it felt itself entitled. Petitioner made its choice to intervene despite its purported reservation of rights (10s). It apparently "wanted to have its cake and eat it too", if we may be permitted an apt expression. It has been held that the acceptance of the benefits of one part of a judgment or decree precludes appeal from the other parts.

> *U. S.* v. *Hougham*, 5 L. Ed. 2d 8, p. 888, 897, 905;
> *Cohen* v. *Cohen*, 3 N. Y. 2d 339, 346.

In the *Cohen* case, the Court of Appeals of New York State at page 346 stated:

> "'[4] Of course the general rule that a party who accepts the benefits of a judgment or order waives

[16] Page 1731 of certified record.

his right to appeal from it (see Matter of Silverman (Hoe & Co.), 305 N. Y. 13, 17, 110 N. E. 2d 402, 403; Cohen and Karger, op. cit., p. 406) applies to appeals taken under Section 580. We can find no evidence in the record, however, to support the conclusion of the Appellate Division that the husband 'accepted the benefit conferred by the order'."

* * * * *

"In any event, the husband never exercised these rights, and the mere existence of a right to claim certain benefits, without the acceptance of those benefits, does not result in a waiver of the right to appeal."

Moore's Vol. 7, §73.04, p. 3127;
Colquette v. *Crossett*, 149 F. 2d 116, 118 (C. C. A. 8th);
Kaiser v. *Standard Oil Co.*, 89 F. 2d 58 (C. C. A. 5th).

Having accepted the full benefit of intervention petitioner waived any right to appeal from Judge Mishler's order to the Court of Appeals for the Second Circuit. Its further plea to this court for certiorari upon the same grounds is baseless and no more than an overpersistent attempt to obtain another hearing.

The purported reservation of rights included in the written waiver was apparently merely a gesture. It was not implemented by any steps toward appeal, but rather any right to an appeal, if it was created by such waiver, was waived as well by petitioner's non-action.

Moreover the *waiver* of any right to appeal, if such right was created by petitioner's gratuitous reservation of rights, was confirmed not only by petitioner's failure to

timely appeal, but also by its failure to demand a jury when it reached party status, either on a pleading or by separate demand, and by its failure to demand a jury at opening of the trial as well as by its full participation throughout the trial.

3. The questions presented are on alleged errors of law of private concern only.

The private dispute between these litigants can be of concern only to themselves and their counsel. The decision below turns upon its own peculiar facts and it is highly unlikely that these unusual facts will recur in relation to the propositions of law here involved.

No broadly social judgments are here under review. This is not a case which presents questions whose resolution will have immediate importance far beyond the particular facts and parties involved or tremendously important principles upon which are based the plans, hopes and aspirations of a great many people throughout the country.[17] In fact the question of jury trial was limited in its decision by the Court of Appeals to the "peculiar circumstances of this particular case * * *." (42s).

4. No conflict of decision exists.

The petition fails to disclose any conflict of decision. The cases cited by petitioner are inappropriate to the issues presented. Petitioner failed to persuade the District Judge and the three judges of the Court of Appeals upon appeal and petition for reargument to adopt its view of the law and facts. Nevertheless petitioner continues to urge its differing view of the law and its uncredited ver-

[17] Address of Chief Justice Vinson before American Bar Association, September 7, 1949, St. Louis Daily Record (Sept. 8, 1949, p. 1).

sion of the facts as the basis for its claimed conflict of decision.

It is apparent that what petitioner really seeks is another hearing. This Court has declared that the jurisdiction of this Court to review cases by way of certiorari was not conferred merely to give the defeated party in the Court of Appeals another hearing. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163.

Petitioner seems chagrined at the criticism of both courts below as to the quality of petitioner's evidence as well as the tactics it employed. To be sure such observations as were made by the courts below were not made lightly.

It is regrettable that in its zeal to obtain another hearing petitioner finds it necessary to again deal loosely with the facts. We have had occasion in the courts below to call attention to glaring and understandably undocumented and unsupported statements of petitioner dealing inaccurately with the facts as well as petitioner's penchant for characterizing its strange version of the facts as "uncontradicted", "conceded" and the like. We do not deem it necessary to burden this Court by again citing chapter and verse of the proof of falsity of the many statements of alleged fact advanced by petitioner. We deem it sufficient to rely upon the findings of the District Court as expressed in Judge Byer's decision (11s) and their appraisal by the Court of Appeals after a review of the entire record as follows:

> "Indeed, we do not see how the trial judge could very well have arrived at a different conclusion" (37s).

It is also regrettable that in its zeal to accomplish its aim, petitioner finds it necessary to accuse the Court of

Appeals of "shedding a crocodile tear for a constitutional guarantee" and that it "wanted to punish the petitioner" (p. 11, first complete paragraph of Petition after quotation).

This is all the more regrettable when it is considered that petitioner has accused said court of refusing "to be governed by the constitution" and setting itself up above the constitution (p. 12 of Petition).

However, the integrity and reputation of this distinguished court are established beyond the reach of slurs or the need for defense.

CONCLUSION

The decision below is correct and involves neither a conflict of decision nor any question that should be settled by this Court nor a question of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, New York, New York, November 29, 1962.

PHILIP G. FITZ,
Counsel for Respondent.

WILLIAM V. HOMANS,
PHILIP G. FITZ,
Of Counsel.

APPENDIX

Rule 24

Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or of an officer thereof. [As amended Dec. 27, 1946, effective March 19, 1948.]

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [As amended Dec. 27, 1946, effective March 19, 1948.]

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C. §2403. [As amended Dec. 29, 1948, effective Oct. 20, 1949.]

VI. TRIALS

Rule 38

Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39

Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 52

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). [As amended Dec. 27, 1946, effective March 19, 1948.]

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

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Supreme Court of the United States

No. 472

THE UNITED STATES OF AMERICA for the Use and Benefit of BROWNE & BRYAN LUMBER CO. INC.,

Plaintiff-Respondent,

against

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Defendant-Respondent,

and

OVE GUSTAVSSON CONTRACTING CO. INC.,

Petitioner and Intervenor-Appellant.

PETITIONER'S REPLY BRIEF

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Petitioner and Intervenor-Appellant.

PETITIONER'S REPLY BRIEF

Statement

Summarizing respondent's brief in opposition to the petition for certiorari, it is found that its arguments are not based upon the points made by petitioner, but instead it sets up its own so-called "questions involved" and then says that such do not require the grant of the petition. It also continues the art it employd in the lower court, which was so successful, of confusing the specifics with the general and vice versa and adding to the confusion by calling petitioner names. This tends to create a false aura of injury to respondent. It even argues that petitioner's claims of error are erroneous because the lower courts have said so (see pp. 18 and 19 of resp. brief).

It would perhaps be best to probe and expose the false ideas in respondent's brief in the order in which they appear in the brief. (This method makes for disjointed although precise reading. The heart of the matter is at pp. 5-12, *infra*.)

Matters Requiring Reply

At pages 2-4, respondent changes petitioner's two questions into three irrelevant and obviously improper questions upon which to base a petition for certiorari.

Petitioner's first question still concerns the power of the District Court to require a party to waive its right of trial by jury as a condition to permitting that party to intervene. Obviously as the intervention rule does not grant the District Court any power to take from litigants their constitutional rights, they can have none, as no such right will be implied. Respondent's proposed question on this subject will be discussed *infra*.

Petitioner's second question still is whether the Court of Appeals properly applied the "clearly erroneous" rule to the facts of this case. The respondent has taken occasion to divide this point into two separate statements which apparently provide respondent with two vehicles to call petitioner names. These two will be discussed *infra*.

At page 5 respondent commences its "statement of the case" but it does not deny the existence of the facts claimed by petitioner, nor their chronology as set forth at pages 3-10 of the petition. Instead, it recites the following ideas which are irrelevant but tend to impugn petitioner's good faith.

At page 5:

(a) that this suit was for $19,848.25, balance due on lumber used on the job. This statement merely lumps three separate contracts of sale for different lumber requirements, two of which contracts are not used in dispute.

(b) "that the lumber was used on the job" does not deny that petitioner used the lumber after it had refabricated the lumber, which is the dispute.

(c) the amount petitioner got from the government is evidence of its own fulfillment of the contract. The idea that plaintiff should be paid because petitioner was paid is a non-sequitor.

(d) Similarly, that petitioner completed its job without delay does not absolve respondent from liability for its own delay.

At page 6 (a) plaintiff's (respondent's) profit of about $1,500 has nothing to do with its responsibility for delivery of the lumber according to the terms of the contract.

(b) Extensions of time to answer the complaint are said to have been generously spaced overlooks the real fact that respondent wanted to settle this suit, not prosecute it, and that it had started the suit against the Massachusetts Bonding and Insurance Company, the surety on the payment bond under the Miller Act only, and that the extensions of time to answer were granted to that defendant and not to this petitioner and that they were granted for the express purpose of working out a settlement of the action (3s, 4s).

At page 7:

(a) respondent fails to mention that the only pre-trial deposition that was taken before the case was so surreptitiously put on the calendar, was the one taken by respondent pursuant to notice dated October 6, 1960, to the defendant surety, that respondent would take the deposition of the witness Ove Gustavsson who was subpoened by respondent to attend and who attended on the appointed day and gave testimony. The transcript of this deposition was received by defendant's counsel on November 15, 1960 along with a note of issue placing this case on

the calendar, without giving the defendant surety a reasonable opportunity to seek a pre-trial deposition of the plaintiff. An affidavit of non-readiness was duly filed (1s). Defendant's notice to take the pre-trial deposition of respondent was served and filed with the affidavit of non-readiness. The petition to intervene was filed 4 days later on November 25, 1960 (1s). This latter petition was returnable December 8, 1960 and was adjourned at respondent's request to December 22, 1960. In the meantime, on December 16, 1960, a pre-trial conference was held before Judge Bartels, district judge. The motion to intervene was called to the attention of Judge Bartels and he noted it and nevertheless, he marked the case "ready", putting it down for January 19, 1961, to give petitioner sufficient time to intervene.

(b) The inference that Judge Mishler had adopted respondent's argument to refuse a jury trial because such a trial would delay the trial of this case is not borne out by the decision of the court on the motion (8s) nor by the order that was entered thereon (9s), but the fact that the Judge was advised that intervenor would go to trial on any day picked would also set this idea to rest as unsound.

At page 8:

(a) the idea that intervenor participated in pre-trial discovery proceedings and hence, that it waived its right to a jury trial, is based upon the fact the petitioner was directed by court order to appeal for a pre-trial deposition by respondent after having intervened. The reference to page 1803 of the certified record is to the transcript of that pre-trial deposition, which was conducted by respondent for its own preparation for trial.

At pages 8-9:

(a) the respondent claims that this error advanced by petitioner is not the concern of the nation. The short

answer to this is when has the constitutional right of trial by jury ceased to be of national concern?

(b) The respondent claims that petitioner has not shown that its question No. 1 has been decided "in a way in conflict with the applicable decisions of this court or which, perhaps, has not been precisely before this court" overlooks the last mentioned alternative.

(c) Respondent's argument relative to petitioner's so-called delay in intervening justified Judge Mishler's direction to waive a jury is based, in the first instance, upon respondent's own re-phrased first question, which in turn is based upon the premise that petitioner's right to intervene was permissive and not a matter of right.

Petitioner claims that its right to intervene is a matter of right (see pp. 16-18, petition). Petitioner claims that its right is one provided under Rule 24 (a)(2) which reads that one may intervene *as of right*, "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action" (46s). This action was started against the surety only and was to recover the contract price on an alleged contract had with the petitioner. The surety was not a party to the respondent's contract with petitioner, but was separately liable, if at all, under a bond guaranteeing petitioner's performance of its contract with respondent. The respondent's suit was necessarily bottomed upon allegations of its contract with petitioner, its own faithful performance of that contract and the breach of it by petitioner. As petitioner claimed that respondent had breached the contract in various respects causing damage, thus proof of such breach would both defeat the suit and enable petitioner to recover damages by way of counterclaims. As surety, the only defendant in respondent's action, that defendant could, even in the absence of petitioner in the suit, assert respondent's breach of its contract with petitioner as a defense,

Coughran v. *Bigelow*, 164 U. S. 301, 310, but, it could not assert the counterclaims of the petitioner, which were personal to petitioner.

Joyce v. *Cockrill*, 92 Fed. Rep. 838, aff'd 179 U. S. 591.

Yet, petitioner would be bound by the decision in the action even though it had not been a party to the action. See page 16, petition. Consequently, petitioner, as a matter of right, qualified under Rule 24(a)(2) to enter this case against the surety alone. Respondent says, without proof, that petitioner's right to enter this case was permissive only. From this false premise it goes on to argue that there was no showing by petitioner that in requiring the waiver of a jury trial as a condition to intervene, the district judge had abused its discretion. Obviously, if the petitioner has a right to enter this case as a matter of right, there is no need to argue "abuse of discretion". Even so, is not a direction to waive a constitutionally guaranteed right which had been diligently sought and demanded (2s), a rather harsh condition to impose upon the entrance of a party to a litigation? The excuse is advanced that a jury trial would have delayed the trial. But what of petitioner's right to a trial by a jury? The right to an early trial can not be of greater importance then a right guaranteed by the Constitution. In fact, the denial of a trial by jury forced this petitioner into an unconstitutional court, and all proceedings therein were a nullity.

Smyth Sales, Inc. v. *Petroleum Heat and Power, Inc.*, 141 F. (2) 44.

That denial is ground for reversal of the final judgment entered thereafter.

Monolith Portland Midwest Co. v. *Reconstruction Finance Co.*, 240 F. (2) 444;
Sutton v. *Johnson Cotton Co.*, 114 F. (2) 308.

Furthermore, petitioner was not objecting to an early trial. The matter was discussed on the usual pre-trial conference before Judge Bartels on December 16, 1960 who considered the pendency of the motion to intervene and nevertheless, he set the case down for trial for January 19, 1961 (35s). On the argument of the motion to intervene, which was December 22, 1960, petitioner stated it had no objection to going to trial when the case was reached, only let the trial be a jury trial. There is no proof to the contrary. Petitioner could have gone to trial just as early to a jury, as to a judge alone. As a matter of fact the trial was delayed by respondent to March 9, 1961, so that it could undertake further pre-trial depositions of petitioner, as a party. In any event, Rule 24, nowhere states that a right to intervene, whether by permission or as a matter of right, may be conditioned upon the denial of a right of trial to a jury. Doesn't it then follow that even if it were permissive, that the trial court abused its discretion in demanding a waiver of a jury trial as a condition to intervening?

The present claim of respondent that the so-called delay justified the District Court's direction that a jury trial be waived is not only not sound as a matter of law, it is not proven as a matter of fact. As appears from Judge Mishler's order granting intervention on the condition in question, the papers used by the judge on the motion was the petitioner's affidavit of September 6, 1960, an affidavit by counsel for respondent dated December 14, 1960 and an affidavit of counsel for petitioner dated December 20, 1960 (9s). This last affidavit only is reproduced in the petition at 3s-8s inclusive. The respondent says now that there were no settlement talks going on between the commencement of this action in April and the filing of the answer by the surety, the only defendant, on August 30, 1960. The affidavit in reply dated December 20, 1960 states that the reasons for the time spent before answering were the many efforts made to settle this litigation. The affi-

davit remains uncontradicted. This was not because respondent had no opportunity to contradict the statements in that affidavit, but because the facts there stated were true and respondent could not contradict them. Rather, emphasis was placed by respondents on the delay that would be encountered in the future by the transfer of this case to the jury calendar. This is made clear by respondent, at page 12 of its brief in this court. As stated above, petitioner was entering a case set down for trial for January 19, 1961, it could not expect an adjournment and it did not request an adjournment on the trial. It did ask that the trial be to a jury rather than to the court alone. Judge Mishler's only comment was that a judge could better try a case as this. He reserved decision and made the decision appearing at 8s.

At pages 11-12, respondent says that because the surety had waived a jury trial, the petitioner also waived it. This claim is based upon the premise that the attorney for the two parties was the same. Each party's rights to a jury trial are guaranteed to them personally, and no waiver can be spelled out unless it is brought home to the party against whom the waiver is claimed. The fact that two parties employ the same lawyer and that the defenses of those two parties are the same (nothing is stated about the appearance of the counterclaims in favor of the petitioner, which were adopted by the surety as an offset), does not make the waiver of one of the parties binding upon the other. Indeed, in this case, the surety's waiver of a jury trial was by default in demanding it and before petitioner entered the case. A jury trial is the right of every party to an action so long as it is one of the actions in which the Constitution preserves the right.

Hanson v. *Safeway Stores* (9 C. A., 1956), 238 F. (2) 336, 339;
Oklahoma Contracting Co. Inc. v. *Magnolia Pipe Line Co.* (5 C. A., 1954), 195 F. (2) 391, 396.

Just how the employment of a lawyer in common by these parties would create a waiver of a jury trial is not explained and of course, it can't be explained. It is obvious that the facts of the case decide the rights of the parties. Consequently, the arguments advanced by respondents actually point up the just need of a writ by this Court to inquire into the facts leading to the decision directing the waiver of a jury trial.

At pages 13-14:

(a) respondent argues that there was a waiver and not a direction to waive, because no appeal was taken from Judge Mishler's order directing the waiver but that there was an acceptance by intervening and participating in subsequent events. In the first place the order insofar as it directed the waiver of a jury trial was not appealable.

City of Morgantown v. *Royal Ins. Co.* (1948), 327 U. S. 254;
Zalzneck v. *Sims; et al.* (6 C. A., 1957), 248 F. (2) 952;
Black v. *Boyd* (6th C. A., 1957), 248 F. (2) 156, 159.

The court in *Black* v. *Boyd, supra,* said at page 159 "The order denying jury trial is interlocutory and not appealable, although it is subject to Appellate review after a final judgment is entered."

In so holding, the court relied upon this court's decision in *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, stating that it was the policy of Congress to limit appeals to final judgments. Hence, petitioner had the right to await the final judgment in the case before appealing from the direction to waive a jury trial. Furthermore, the waiver which was actually filed by petitioner put respondent on notice that an appeal from that order would be taken (10s). The

respondent could have agreed to a jury trial anyway, if it wanted to, but it did not. Apparently, it preferred to rely upon the correctness of Judge Mishler's order. Consequently, if upon a test of that order, it is found unconstitutional, shouldn't respondent assume the responsibility for its lack of effectiveness?

(b) The two cases cited by respondent at page 14 for the proposition that a jury trial was waived by the petitioner's participation in subsequent proceedings apply to equity cases and not to cases, as here, for the ordinary breach of contract seeking money damages.

(c) The further argument of respondent that the petitioner did not demand a jury after it had become a party and that such failure constitutes a waiver is obviously false as the petitioner was under order of the Court to waive the jury trial and a later demand for a jury trial would have been ground for complaint from respondent.

The foregoing comments also answer respondent's Point 2 beginning at page 15 of its brief. It is respectfully submitted that the two cases cited at page 15 and the two at page 16 are not appropriate to the facts of this case at all.

At page 17 respondent calls this a private dispute. This court is better able to judge whether an invasion of a constitutional right is a private dispute or one in which the American public has a stake. Especially, in this day and age, where the most important difference between our system of government and the Soviets, is our judicial system which begnignly imposes upon all Americans, a rule by law rather than by fiat or a ruling personality or clique, and the singular strength of that rule by law is to be found in the constitutionally guaranteed right of trial by jury.

At pages 17 to 19, respondent argues that no "conflict" appears in the second of petitioner's questions discussing the duty of a Court of Appeals to examine the whole record upon an appeal where the appellant complains that

the trial court, without a jury, overlooked uncontradicted or admitted evidence and hence that upon the whole evidence the Court of Appeals would be left with the firm conviction that a mistake had been committed. However, respondent does not argue the matters presented by petitioner. Instead it calls names and repeats the vile language used by the courts below to attack the credibility of petitioner's evidence. That there was no ground for this violent language by the courts below would be apparent, if appellant's claims were true, that there was admitted or uncontradicted facts controlling to the decisions and that the facts are in the record and were overlooked by the trier of the facts. Why didn't respondent argue against the fact dissertion of the petition? Instead, the distractive arguments of the respondent are reduced to restating the claims of the courts below that they did not have to credit as true, the evidence of the petitioner in support of its counterclaims. What about petitioner's claims that there was no proof of respondent's cause of action? Petitioner's main contention is and has been that the facts are uncontradicted or are conceded that respondent's case lacked proof of performance according to the terms of the contract. This failure of proof was documented to the Court of Appeals by proper citation to the record. See pages 23-32 of the petition. All the vile remarks of the courts below have to do with petitioner's counterclaims, not with respondent's *prima facie* case. Yet, it was respondent who had commenced this suit and who had pleaded a contract of sale, a performance of that contract as modified, and the breach by a failure to pay the contract price. It is basic that respondent's proofs should have included performance according to contract terms. That the courts below overlooked this is obvious, they say nothing about it but the trier of the facts said that petitioner failed in its proof of *non-performance* and the Court of Appeals repeated that error. Actually, this court will find upon an inspection of the record that the decision is contrary to law.

Consequently, it is argued, here, that this court ought to instruct the Court of Appeals, generally, that they should examine the case on the whole evidence, when the essential facts of the case have been overlooked by the trier of the facts, to ascertain whether or not, in their opinion, a mistake was made.

WHEREFORE petitioner prays that a writ of certiorari be issued on one or the other of the questions presented by petitioner or on both of them.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney for Petitioner.

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Supreme Court of the United States

No. 472

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Plaintiff-Respondent,

against

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Defendant-Respondent,

and

OVE GUSTAVSSON CONTRACTING CO. INC.,

Petitioner and Intervenor-Appellant.

PETITION FOR RE-HEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 472

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO. INC.,

Plaintiff Respondent,

against

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OVE GUSTAVSSON CONTRACTING CO., INC.,

Petitioner and Intervenor-Appellant.

PETITION FOR A RE-HEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE THE CHIEF-JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement of Regularity

The petitioner, above-named, respectfully prays this Honorable Court to grant a re-hearing on the order of this Court denying its petition for a writ of certiorari.

The order denying the petition for a writ of certiorari (with Mr. Justice Black dissenting) was made by this

Court on or about December 17, 1962. Time to file this petition for re-hearing was extended by order of Mr. Justice Harlan dated January 7, 1963, to and including February 8, 1963 and pending at this writing is petitioner's application for a further extension of several days more to encompass the time that will be needed to print, serve and file this petition.

Prior Proceedings

This suit is by a materialman under the Miller Act [40 U.S.C.A. 270(a) and (b)] for the agreed price of about $19,000 for lumber it agreed to manufacture and deliver to petitioner against which petitioner sought to defend and to assert a counterclaim for about $23,000 for use—plaintiff's breach of the same contract. Petitioner entered this litigation by way of the Intervention statute (Rule 24 of the Rules of Federal Civil Procedure) because the materialman had named only petitioner's surety as defendant.

Petitioner moved the District Court for permission to intervene and wrote across its intended pleading, that petitioner demanded a "trial by jury" (2s).* The District Court granted intervention but required petitioner to waive a trial by jury (8s, 9s). Petitioner waived a jury trial but reserved its right to a review of said direction to waive a jury trial (10s). After an ensuing trial before the court without a jury, judgment was awarded plaintiff for the amount of its claim and all of petitioner's counterclaims but for $350 were dismissed. This decision of the Trial Court was without support in the evidence.

Petitioner appealed claiming among other errors the District Court's order directing a waiver of trial by jury. The Court of Appeals affirmed the judgment and respect-

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* References are to pages of the appendix to the Petition for a Writ of Certiorari.

ing the order of the District Court directing the waiver of a jury trial, it affirmed that order on grounds found, *sua sponta*, it denominated "peculiar" to this case.

Point Involved

The ground of this petition is, as indicated by Rule 58 of the Rules of this Honorable Court, a ground which was not before submitted and apparently not considered heretofore but important enough to be considered.

The new ground may be stated in the following question:

> "If a right of trial by jury is guaranteed by the United States Constitution to every litigant in the Federal Courts (assuming a common law action to recover more than $20) then how is that right to be realized if the Supreme Court will not take cognizance of an appeal which has as its fundamental question an unlawful denial of that right?"

Argument

Perhaps the question put is not entirely appropriate but it contains the germ of the idea which struck the petitioner upon learning that its petition for certiorari was denied by this Court. Unfortunately, the Court's reasons or grounds for the denial are unknown and consequently, it is impossible to argue with respect thereto. It did strike petitioner, however, that if a jury trial is a guaranteed right of every person who is forced into Federal Court to litigate questions of fact in matters where the right of trial by jury is preserved by the Seventh Amendment of the United States Constitution, that such right can be realized only, if the performance of the guarantee is assured. Only then, can it be said that the constitutional guarantee is truly a guarantee. Without extending to the people the means to secure that guarantee, the guarantee would be meaningless.

Whose duty or function is it to preserve to the individual the right of trial of jury? It is commonly thought that such function or duty is that of the Supreme Court. This thought appears to follow logically from the judicial powers granted to the Supreme Court by the United States Constitution. Article III, Section 1 provides that "The judicial power of the United States shall be vested in one Supreme Court," and Section 2 states "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of this United States etc.". It would follow therefore, that if the question arises as to who in the United States Government is supposed to see to it that this guarantee is performed, it will be seen that the Constitution by the statement of the judicial powers has ordained and consituted the Supreme Court as the enforcer or the one who is to deliver and realize for a litigant in the United States courts this right of trial by jury. See for example *Muskrat* v. *U. S.*, 219 U. S. 346.

Reverting to the adoption of the Constitution and the considerations given by the Constitutional Convention to the matter of a jury trial in civil cases, it is now a matter of history that although, as originally proposed, the United States Constitution guaranteed the right of trial by jury only in criminal cases, the failure to provide a similar guarantee in a civil case met with serious objections in the convention. There was a general demurrer in the convention to the omission. That discontent was expressed sufficiently to have caused the Seventh Amendment to be adopted. The right of trial by jury is now recognized in civil cases. This Court said in *Parsons* v. *Bedford*, 3 Pet. 433, "That one of the strongest objections originally taken to the Constitution was the want of an express provision securing the right of trial by jury in civil cases". It said further, "That the trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy".

This cherished right is one that cannot be altered except by the people in their collective capacity after careful and deliberate action. See Proffatt "Trial by Jury"; Section 84 at page 446.

This Court has also held that this right is a substantive right which should not be enfringed.

Baltimore & Caroline Line v. *Redman*, 295 U. S. 654, 657;
Patton v. *U. S.*, 281 U. S. 276, 312;
Foust v. *Munson S. S. Lines*, 299 U. S. 77, 84;
Diederich et al. v. *American News Co.*, 128 F. (2) 144.

We ought not to call Constitutional guaranties a mere privilege as was done in the *Patton* case although under the circumstances of that case all this Court did was to hold that a party may waive the privilege. The Court did not have to change the concept of a guarantee to one of privilege. Actually no difference would exist between a guarantee and a privilege if each expresses the recognition of a right possessed. Hence, calling the right a privilege does not effectively downgrade it.

The direction of the District Court to petitioner to waive a jury trial is violative of the Constitution.

In re Debs, 158 U. S. 564, 594-595;
Boyd v. *U. S.*, 116 U. S. 616, 635.

It is assumed that this Court would not downgrade this important right. Then why did it refuse to review the actions of the courts below denying the right to petitioner? Why did it not perceive that it had a duty in this case to deliver the guarantee of the Constitution to petitioner? Was it the waiver which petitioner had signed? The right was required to be waived by the Court and in this, the Court abused its power. Neither the Seventh Amendment

nor the Intervention Statute give the court the right to require the waiver. The requirement of a waiver in this case can be likened to the compulsory reference cases in which this Court has consistently held that it is unlawful if such compulsory reference is made to determine fact issues in common law suits. See *Ex Parte Peterson*, 253 U. S. 300.

Courts should indulge in every reasonable presumption against a "waiver" of this fundamental right. Nor ought they to presume acquiescence in the loss of that right.

Johnson v. *Herbst*, 304 U. S. 458, 464;
Hodges v. *Easton*, 106 U. S. 408, 412;
Slocum v. *New York Life Insurance Co.*, 228 U. S. 364, 384;
Aetna Ins. Co. v. *Kennedy*, 301 U. S. 389, 393.

Nor may the right be waived by merely going to trial after due demand and a denial of the right by the Court. Unfortunately, there are no cases of this description decided by this Court, although there are cases in the Circuit Courts.

Special School District v. *Jones* (8th Cir.), 250 Fed. 440;
Bass v. *Hoagland* (5th Cir.), 172 F. (2) 205;
Sutton v. *Johnson Cott Co.* (4th Cir.), 114 F. (2) 302;
Smyth Sales v. *Petroleum H. & P. Co.* (3rd Cir.), 141 F. (2) 41;
Monolith v. *R.F.C.* (9th Cir.), 240 F. (2) 444.

There is no question about the fact that the trial court in this case did require that petitioner waive its right to trial by jury as a prerequisite to its intervening in the case. See also pages 8s and 9s of the prior petition. The waiver as signed is to be found on page 10s. The waiver was expressly made without prejudice to the right of the inter-

venor to claim that action of the court to be erroneous. The petitioner believed that this protected its right of jury trial. The fact that a trial was later had would not cure the first error of the trial court in denying a trial by jury. *In re Debs, supra; Boyd* v. *U. S., supra.* At least, there are no cases that are decisive of the specific factual point and the cases which held that participation in a trial without a jury effectuates a waiver of the right of trial by jury are cases in which the party voluntarily participated in the trial without preserving its right as was sought to be done in the written waiver filed in this case. It can very well be argued that the appellees here could have obviated the condition upon which the waiver was made by petitioner by consenting to a trial by jury. The situation (trial in an unconstitutional manner) was not of this petitioner's making, but of appellee's making. There was no desire upon the part of the petitioner to delay the trial. It had not expressed itself as wanting a jury trial for the purposes of delay and there is no evidence that it refused to go to trial with a jury at the same time that the case appeared on the calendar for trial without a jury.

It would appear, too, that the published decisions in this case which are now authority for the rule that a jury trial may be taken from a litigant when the case has "peculiar" circumstances, even though the case be a law case and one of those that commonly would be tried to a jury upon the demand of a party. That rule might lead to other incursions upon constitutional rights. Just imagine what some of the judges would think "peculiar" to authorize them to deprive a party of a constitutional right and there will be no "safe" constitutional guarantee. The frustration of the very purposes of the Constitution would be complete. The decisions below in this case can also be said to be an exception to the constitutional right of trial by jury. If exceptions do exist there can be no stopping other minds arriving upon other exceptions which those minds might feel satisfied their judicial discerment. Thus instead of

government by law, we would have government by the personal code of the individual incumbent of judicial office. Nothing could be more foreign to our concept of judicial administration. Yet, the decisions in this case could be looked upon as a milestone in the erosion of constitutional rights, which brings into play Sections 1 and 2 of Article III of the Constitution which is set forth above. A constitutional guarantee is supposed to be a guarantee. It steadfastly belongs to the people. Who can insure the realization of those guarantees for the people? As is set forth hereinabove, it is respectfully submitted that the Constitution has specifically appointed this Honorable Court as the keeper of those guarantees. This Court was entrusted with the sole judicial power by the Constitution. Congress can create other courts, but the one court created by the Constitution in which the judicial power of the United States was vested was this Honorable Court. Being vested with judicial power generally, means more than just judicial power over particular subject matters and particular personalities. It also means that it shall be the duty of the trustee of that power to interpret the law and the Constitution and to re-establish the guarantee if it should be taken from a litigant. To this extent, it is the enforcer of the constitutional guarantees. Consequently, where there is a clear right brought to the attention of this Court which has been abridged by mistaken findings of facts of the courts below, it is respectfully submitted that thereby a situation arises for this Court to use its trustee powers to enforce the right for the litigant. The denial of the petition for a writ of certiorari as in this case when a question of fact arises between the lower court and the litigant affected is, or at least, it can be said to be unconstitutional. This Court is the final arbiter, the constitutionally appointed arbiter. Why then refuse even the right of review to a litigant who without fault on his part, has been deprived of a constitutional right? The heavy burden of the business of the Court cannot be the reason. On certiorari this

Court might stop to question whether it is obliged to grant a petition whenever a constitutional question appears. Here, without answering that question, it is respectfully submitted that it would be sufficient cause for review if it were made to appear that a question of fact had arisen as to whether there are particular circumstances which would make it right to deny that privilege to this litigant. Perhaps this Court has passed upon the sufficiency of the facts which would be submitted by the petitioner in support of its claim for a jury trial. If it has and nevertheless it has denied the writ for certiorari, then presumably there is nothing further this petitioner can do. However, it is submitted that the facts should be fully submitted and argued to the Court because this petitioner feels strongly that the facts do not support the conclusion made by the Honorable Court of Appeals that there were "peculiar" circumstances to justify the direction to waive the jury. This, nevertheless, was direction and it cannot be equated with the voluntary waiver of the litigant. Nevertheless, the so-called facts upon which the Court of Appeals relied are disputed by the petitioner in the sense that they do not exist at all but were only surmised by the Court of Appeals and, therefore, they were not sufficient to support that Court's finding. The District Court in making its direction did not rely upon any "peculiar" circumstances. It wasn't concerned with any "peculiar" circumstances and did not mention "peculiar" circumstances in its decision. It proceeded to direct the waiver of a jury trial only because it thought it had the lawful right to do so. These two judicial actions differing in their approach to the direction depriving petitioner of its right to a jury trial cannot be accepted as though a question of fact had been twice determined against the petitioner. The decisions are quite contradictory to each other and the Court of Appeals' decision especially appears to act as a protagonist for making exceptions to the constitutional guarantees. Consequently, petitioner has felt that it had a right to

stand up and assert its position on the fact issue raised by the Court of Appeals, but if this Court will not act as the arbiter, petitioner's stand must necessarily be frustrated. It need only be called to this Court's attention that the very first act that this petitioner took in this litigation was to petition to intervene. Across the face of that petition it demanded its right to a trial by jury. By all known rules of practice, this action would have been sufficient for this petitioner to have preserved its right to a jury trial. A denial of it in spite of this precaution was actually a taking away of that right.

Consequently, this Court is respectfully urged to reconsider the question of preserving this all important right to a litigant, to correct the record made by the decisions below and to assert its constitutional power as keeper of the guarantees, to enforce and to guarantee the rights set forth in the Constitution. This position is particularly necessary these days in light of the attack upon our form of government from many sources. This will be another re-affirmation of which there cannot be too many, of the guarantees which are made available to the people of this great country. Conversely, a refusal is not only repugnant to the Constitution and to the concept of Rule by Law, but it is fodder for our true enemies. You can hear them scornfully shout with sarcasm concerning our erstwhile sacrosanct rights and privileges. "Constitutional guarantees? Government by law? There are no such." They need not go far for proof.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney for Petitioner.

Certification of Counsel.

I hereby certify that the foregoing is presented in good faith and not for delay, and that the same is restricted to the grounds above specified which were not considered heretofore by this Court.

ANTHONY B. CATALDO,
Counsel for Petitioner.